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Aug. 1896.

A TREATISE

ON THE LAW OF

EMPLOYERS' LIABILITY ACTS

BY

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PREFACE.

THE present stage of development and practical importance of Employers' Liability Acts seem to warrant the publication of an American work upon the subject. The English Employers' Liability Act of 1880 has been followed in the United States by the Alabama Act of 1885, the Massachusetts Act of 1887, and the Colorado and Indiana Acts, both passed in 1893. Many decisions of the highest courts in these jurisdictions have been rendered in actions brought under these statutes, and many questions are now settled. Though differing somewhat in details, these statutes agree in their main features, and all have the effect of extending the common-law liability of employers for personal injuries suffered by their employees. In some directions, the enlargement of the employee's rights has been considerable. The most important provisions are those which give the employee a right of action against his employer for injuries caused by reason of the negligence of the employer's superintendent, and, in the case of railroad employees, for injuries caused by reason of the negligence of any person having the charge or control of certain railroad instrumentalities. The rights and liabilities peculiar to railroad employees

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and employers are considered in chapter v., and the negligence of superintendents in chapter iv.

The author has endeavored to treat the important questions with fulness and thoroughness, in many instances stating the facts of adjudications and the reasoning of the courts in their own language. Less important matters have been treated with less particularity. It is believed that the common-law principles of employers' liability have been stated with sufficient fulness to render clear the advance made by the Employers' Liability Acts. More attention has been given to the common law of the States having such statutes than to that of other States.

Much care has been given to the discussion of the question relating to what facts will or will not justify the presiding justice in withdrawing the case from the jury, and chapters xii., xiii., and xiv. are devoted to this question.

The doctrines of assumption of risk and *volenti non fit injuria* have been fully considered.

The Appendix contains the text of the various Employers' Liability Acts, with amendments to January 1, 1896. The Table of Cases Cited contains upwards of nine hundred cases, many of which are cited more than once in support of different propositions. The Index has been carefully prepared.

CONRAD RENO.

Equitable Building, 150 Devonshire Street,
Boston, *March* 20, 1896.

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§ 1. *Employers' Liability Acts liberally construed in Favor of Employees.*

In Massachusetts it has been decided that the statute should be liberally construed in favor of employees.

The main purpose of the act, as its title indicates, is to extend the liability of employers, and to render them liable in damages for certain classes of personal injuries to their employees for which they were not liable at common law prior to the passage of the act. It does not attempt to codify the whole law upon the subject, nor to restrict the employee's right of action to the cases mentioned in the act. If he could have recovered before the passage of the act, he can also recover since its passage.[1]

The Alabama Employers' Liability Act has not been construed quite so liberally. In Mobile &c. Ry. *v.* Holborn, 84 Ala. 133, 134, the court by Mr. Justice Clopton says: "Being in derogation of the common law, the inference is, that the terms of the act clearly import the changes intended, and their operation will not be enlarged by construction further than may be necessary to effectuate the manifest ends. Notwithstanding, a narrow and restrictive view of the act should not be taken. In its construction the court should consider its objects, have regard to the intentions of the legislature, and take a broad view of its provisions commensurate with the proposed purposes."

In Lovell *v.* De Bardelaben Coal Co., 90 Ala. 13, 17, the court says by Mr. Justice McClellan: "It [the statute] relates to a class of cases in which before no cause of action existed, — to a class of injuries the damages for which, at common law and under our statutes, had been bartered away before they accrued. The statute was one of enlargement purely. No existing right was

[1] Ryalls *v.* Mechanics' Mills, 150 Mass. 190; Coughlin *v.* Boston Tow-Boat Co., 151 Mass. 92; Clark *v.* Merchants &c. Co. 151 Mass. 352.

curtailed, limited, or taken away. The only limitations in the act were upon causes of action created by the act, and having no existence outside of it."

With respect to the English act of 1880, the rule of construction has been thus stated by Brett, M. R., in Gibbs *v.* Great Western Ry., 12 Q. B. D. 208, 211: "This Act of Parliament having been passed for the benefit of workmen, I think it the duty of the court not to construe it strictly as against workmen, but in furtherance of the benefit which it was intended by Parliament should be given to them, and therefore, as largely as reason enables one, to construe it in their favor and for the furtherance of the object of the act."

§ 2. *Statutory Right not identical with Common-Law Right of Action.*

The right of an employee to maintain an action against his employer, under the Employers' Liability Act, is not identical with his right to maintain an action at common law. It may be greater or it may be less.[1] In some cases he stands a better chance of recovery at common law than under the statute. In such cases it is best to frame the count on the common-law liability, as then the plaintiff is not obliged to give notice of the injury, and the amount recoverable is not limited. Where the question is doubtful, however, the safer way is to join a common-law count with a count on the statute in the same action. The plaintiff may also describe his cause of action as falling within the terms of

[1] Coffee *v.* New York &c. Ry., 155 Mass. 21, 22; Lynch *v.* Allyn, 160 Mass. 248, 252.

two or more sections or clauses of the statute, in different counts of the same declaration.[1]

§ 3. *Prior English Construction followed.*

As the Massachusetts act is copied verbatim from the English act of 1880, with only a few variations in matters of detail, the construction given to the English act, before the adoption of the Massachusetts act, is important if not controlling in determining the construction to be given to the same terms in the Massachusetts act.[2]

The Alabama statute of 1885, as far as it goes, is a substantial copy of the English act of 1880. Some of the provisions of the English act had received judicial construction before the passage of the Alabama act. It has accordingly been held that the subsequent enactment by the Alabama legislature is persuasive evidence of a legislative adoption of the prior English construction.[3]

[1] Beauregard *v.* Webb Granite Co., 160 Mass. 201; Louisville &c. Ry. *v.* Mothershed, 97 Ala. 261; Highland Avenue &c. Ry. *v.* Dusenberry, 94 Ala. 413, 418.

[2] Ryalls *v.* Mechanics' Mills, 150 Mass. 190, 191; Mellor *v.* Merchants' Manuf. Co., 150 Mass. 362, 363. In Commonwealth *v.* Hartnett, 3 Gray, 450, it was held that the decisions of the English courts, that the wife of the owner of a building was not within the terms of a statute which prohibited larceny in a building, would be followed in the construction of the later Massachusetts act of the same purport. In delivering the opinion of the court, Metcalf, J., says: "It is a common learning, that the adjudged construction of the terms of a statute is enacted, as well as the terms themselves, when an act which has been passed by the legislature of one state or country is afterwards passed by the legislature of another. . . . For, if it were intended to exclude any known construction of a previous statute, the legal presumption is that its terms would be so changed as to effect that intention." Page 451.

[3] Mobile &c. Ry. *v.* Holborn, 84 Ala. 133, 134.

The rule has been thus stated by Mr. Justice Coleman, speaking for the court, in Birmingham Ry. *v.* Allen, 99 Ala. 359, 371: "The Employers' Act, as found in section 2590 and subdivisions, is a substantial if not an exact copy of the English act of 1880. This court is not finally concluded by the decision of any other state court, or the British court, in their construction of a similar statute; but the opinions of learned courts upon similar questions are entitled to great weight, and this is especially true when the statute from which ours was copied had been construed prior to its enactment by our legislature." [1]

So, when Congress adopts the language of an English statute, the federal courts will presume that it had in mind the construction given by the English courts, and intended to incorporate it into the statute.[2] So, likewise, where the legislature of one State adopts the language of a statute of another State, it is presumed to incorporate the construction given to the statute by the prior decisions of the courts of such other State.[3]

§ 4. *No Retrospective Operation.*

The first section of the Massachusetts act of 1887 expressly provides that "where, *after the passage of this act*, personal injury is caused to an employee," etc., he may maintain an action therefor in the cases specified. It follows that the statute does not give a right of action

[1] Citing Armstrong *v.* Armstrong, 29 Ala. 538. See, also, Kansas City &c. Ry. *v.* Burton, 97 Ala. 240, 246.

[2] Interstate Commerce Com. *v.* Baltimore &c. Ry. 145 U. S. 263; McDonald *v.* Hovey, 110 U. S. 619.

[3] Missouri Pacific Ry. *v.* Haley, 25 Kans. 35, 53.

for injuries received before its passage. Its operation is merely prospective and not retrospective.

The Alabama act of 1885 does not expressly limit its operation to subsequent injuries; nor does it declare that it shall apply to prior injuries. The well-settled rule in like cases is that, unless there is something in the act to show that the legislature intended to give a new remedy for prior acts of negligence, the statute will be construed as merely prospective in its operation.[1] Applying this rule to the Alabama act, the conclusion is that it does not give a right of action for injuries received before the statute took effect. But the operation of the statute upon subsequent injuries is not prevented by the fact that the employee was working under a contract entered into prior to the passage of the act.[2]

§ 5. *To what Classes of Employees the Employers' Liability Acts apply.*

The various statutes differ considerably with respect to the classes of persons entitled to their benefit. The acts of Alabama and Colorado apply to all classes of employees and contain no exceptions. The Massachusetts act applies to all classes except domestic servants and farm laborers injured by other fellow-employees.[3] The Indiana act applies merely to employees of railroad and other corporations, except municipal, operating in the State, and does not extend to the employees of firms or of individuals.[4] The English act applies to railway

[1] Kelley *v.* Boston & Maine Ry. 135 Mass. 448.

[2] Alabama Great Southern Ry. *v.* Carroll, 97 Ala. 126, 137.

[3] Mass. St. 1887, ch. 270, § 7.

[4] Ind. St. 1893, ch. 130, § 1.

servants, and to any person to whom the Employers and Workmen Act, 1875, applies.[1]

A state statute, giving a right of action for a personal injury in general terms, applies to citizens of other States injured within the State, as well as to citizens of the State in question. It has even been intimated that a statute which purported to limit the right to citizens of the State, and to exclude citizens of other States, would contravene section 2 of article 4 of the United States Constitution, declaring that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."[2]

§ 6. *Contracting out of the Statute, or waiving its Benefit.*

In England it has been held that it is not contrary to the policy of the statute to allow an employee to waive the benefit of the act by contract, and that such a contract is binding not only upon the employee himself, but also upon his representatives.[3] In the English act of 1880, under which Griffiths *v.* Dudley, 9 Q. B. D. 357, was decided, there was no clause prohibiting the making of such a contract.

In Alabama, however, under its Employers' Liability Act, although it contains no clause expressly avoiding contracts waiving the benefit of the act, it has been held that such a contract is void as contrary to public policy. In Hissong *v.* Richmond &c. Ry., 91 Ala. 514,

[1] 43 & 44 Vict. c. 42, § 8. See Morgan *v.* London Omnibus Co., 13 Q. B. D. 832; Yarmouth *v.* France, 19 Q. B. D. 647.

[2] Jeffersonville &c. Ry. *v.* Hendricks, 41 Ind. 48, 71.

[3] Griffiths *v.* Dudley, 9 Q. B. D. 357. But see Baddeley *v.* Granville, 19 Q. B. D. 423, 426, 427.

a switchman was injured while coupling cars, through the negligence of the engineer. One of the conditions of the contract of employment was "that the regular compensation paid for the services of employees shall cover all risks incurred, and liability to accident from any cause whatever. If an employee is disabled by accident or other cause, the right to claim compensation for injuries will not be recognized." In holding this contract void, the court, by Clopton, J., says on page 517: "The statute makes the employer answerable in damages when an employee is injured in any of the classes of negligence specified therein. Such a stipulation, being in contravention of the statutory provisions, is opposed to public policy, and does not avail to secure non-liability for an injury caused to an employee by defendant's own negligence or misconduct in the cases specified in the statute." [1]

This view is more in line with the general current of authority, and seems better than the English doctrine.

In line with these decisions, it has been subsequently held that the rights and liabilities conferred and imposed by the statute do not spring from the contract of employment, and that the only office of the contract is to establish the relation of master and servant. "Finding this relation, the statute imposes certain duties and limitations on the parties to it, wholly regardless of the stipulations of the contract as to the rights of the parties under it, and, it may be, in the teeth of such stipulations." [2] It was accordingly held that the mak-

[1] See, also, Richmond &c. Ry. *v.* Jones, 92 Ala. 218.

[2] Alabama Great Southern Ry. *v.* Carroll, 97 Ala. 126, 138, per McClellan, J., for the court.

ing and part performance of the contract of service in Alabama did not give an employee a right of action under the Alabama statute for an injury received in Mississippi, in which latter State there was no Employers' Liability Act.

§ 7. *Same. Prohibition by Statute.*

In Indiana, whose act applies to all corporate employers except municipal corporations, the fifth section provides that —

"All contracts made by railroads or other corporations with their employees, or rules or regulations adopted by any corporation releasing or relieving it from liability to any employee having a right of action under the provisions of this act, are hereby declared null and void." [1]

In Iowa the railroad act declares that "no contract which restricts such liability shall be legal or binding." [2]

In Massachusetts a statute passed in 1877, ten years prior to the Employers' Liability Act, declares that —

"No person or corporation shall, by a special contract with persons in his or its employ, exempt himself or itself from any liability which he or it might otherwise be under to such persons for injuries suffered by them in their employment, and which result from the employer's own negligence, or from the negligence of other persons in his or its employ." [3]

[1] Indiana Acts of 1893, ch. 130, § 5, March 4, 1893.

[2] Iowa Rev. Code 1880, § 1307. See, also, Texas Acts of 1891, ch. 24, § 3; Florida Acts of 1891, No. 62, May 4, 1891; Wyoming Acts of 1891, ch. 28.

[3] Pub. Sts. ch. 74, § 3; St. 1877, ch. 101, § 1.

Though the point has not yet been raised, it would probably be held that this statute applies to a right of action conferred by the Employers' Liability Act, as well as to a right of action existing independently of that act. In either case, a contract exempting the employer from liability would be probably void, and no defence to an action. In 1894 this statute was reënacted in the same terms.[1]

In actions under Mass. Public Statutes, ch. 112, § 212, giving a right of action for the benefit of the widow and children or next of kin of a person killed by the negligence of a railroad company, it has been decided that a release of damages given by the deceased does not release the company from liability or prevent a recovery, because the amount recovered is "in substance

[1] St. 1894, ch. 508, § 6.

But a contract that an employee will not hold the employer liable for the obvious risks of the business which he undertakes is not within the meaning of this statute and is valid, because an employer is not liable for an injury caused by an obvious danger, either at common law or under the Employers' Liability Act. In O'Maley *v.* South Boston Gas Light Co., 158 Mass. 135, at 137, Knowlton, J., says for the court: —

"We have no doubt that one may expressly contract to take the obvious risks of danger from inferior or defective machinery, as well since the enactment of this statute [Employers' Liability Act] as before. If he does so, his employer owes him no duty in respect to such risks, and, if he is hurt from a cause included in the contract, the defect is not within the terms of the statute; the maxim, *Volenti non fit injuria*, applies, and he cannot recover."

The point decided in the case just cited was that the law implied such a contract; and that an employee could not recover for an injury received in falling off his employer's coal-run, which was not protected by a guard. When, however, the employer has committed a breach of an express statutory duty, the maxim does not apply, and will not relieve him from liability under the Employers' Liability Act. Baddeley *v.* Granville, 19 Q. B. D. 423.

a penalty given to the widow and children and next of kin, instead of to the Commonwealth." [1]

§ 8. *Common-Law Rules as to exempting Employer from Liability for Negligence.*

Irrespective of statute it has been generally held in the United States that a contract made in advance whereby an employee agrees to release and discharge his employer for any injury he may receive by reason of the negligence of his employer, or of his servants, is contrary to public policy and void.[2] A contrary rule prevails, however, in Georgia.[3]

In Bailey on Master's Liability, the Georgia rule is approved; and it would seem that the learned author is of opinion that a state statute which expressly prohibits the making of such a waiving contract is itself contrary to public policy and void, as applied to such risks as the employee impliedly assumed at common law. Thus, on pages 478, 479, it is said: "Courts, in giving to such statutes the force of prohibiting the assumption of those risks by express terms in a contract which were impliedly assumed at common law by the ordinary contract of service, upon the ground that such contracts are

[1] Doyle *v.* Fitchburg Ry., 162 Mass. 66, 71, per Morton, J. See, also, Commonwealth *v.* Vermont &c. Ry., 108 Mass. 7.

[2] Roesner *v.* Herman, 8 Fed. Rep. 782; Railway Co. *v.* Spangler, 44 Ohio St. 471, 8 N. E. 467; Kansas Pacific Ry. *v.* Peavey, 29 Kans. 169; s. c., 34 Kans. 472; Little Rock &c. Ry. *v.* Eubanks, 48 Ark. 460; 3 S. W. Rep. 808; 2 Thompson on Neg. 1025 (criticising Western &c. Ry. *v.* Bishop, 50 Ga. 465, and later Georgia cases); Johnson *v.* Richmond &c. Ry. 86 Va. 975; Richmond &c. Ry. *v.* Jones, 92 Ala. 218; Purdy *v.* Rome &c. Ry. 125 N. Y. 209.

[3] Western &c. Ry. *v.* Bishop, 50 Ga. 465; Fulton Mills *v.* Wilson, 89 Ga. 318.

against public policy, must in effect declare that the common law was against public policy." And on page 480 it is said: "An act cannot be made against public policy by a simple declaration that it is so."

The learned author seems to overlook the well-settled principles of law that the legislature, and not the court, is the final judge of public policy; that it has the power to change the rule of public policy at any time, whether the former rule was of common law or of statutory origin; that the legislature's decision upon this question is binding upon the courts; and that no statute can be declared void by the courts on the ground that it is contrary to public policy.[1]

In the License Tax Cases, *ubi supra*, Mr. Chief Justice Chase, in delivering the opinion of the court, says on page 469: "The legislature has thought fit, by enactments clear of all ambiguity, to impose penalties for unlicensed dealing in lottery tickets and in liquors. These enactments, so long as they stand unrepealed and unmodified, express the public policy in regard to the subjects of them. The proposition that they are contrary to public policy is therefore a contradiction in terms, or it is intended as a denial of their expediency or their propriety. If intended in the latter sense, the proposition is one of which the courts cannot take cognizance."

In the City of Norwich, 118 U. S. 468, 495, in which it was held that insurance is no part of a shipowner's interest in the ship or freight within the meaning of

[1] License Tax Cases, 5 Wall. 462; Powell *v.* Pennsylvania, 127 U. S. 678, 685; Sharpless *v.* Mayor, 21 Pa. St. 147, 159; Hedderick *v.* State, 101 Ind. 564; Mobile *v.* Yuille, 3 Ala. 137.

the Limited Liability Act of 1851 (U. S. Rev. Stats. §§ 4282–4287), the court says by Mr. Justice Bradley: "The truth is, that the whole question, after all, comes back to this: Whether a limited liability of shipowners is consonant to public policy or not. Congress has declared that it is, and they, and not we, are the judges of that question."

§ 9. *Agreement by Parent of Minor Employee not to sue Employer.*

A release of all claim for damages for personal injuries which may be received by a minor child of the releasor, while in the employ of the defendant, may bar an action by the parent; but it will not prevent the minor from recovering damages estimated from the time of reaching majority to the probable time of his death.[1]

§ 10. *"Relief Fund" Agreement not to sue Employer.*

A contract by which an employee may either accept the benefit of a relief fund made up of contributions from the employer and employees, or sue for damages for a personal injury caused by the employer's negligence, is not contrary to public policy, and if after injury the employee accepts money from such relief fund, he waives the right to sue, and cannot recover damages for his injuries.[2]

Even if the employee is a minor, such a contract is

[1] International &c. Ry., *v.* Hinzie, 82 Texas, 623.

[2] Lease *v.* Pennsylvania Ry., 10 Ind. App. 47; Spitze *v.* Baltimore &c. Ry., 75 Md. 162; 23 Atl. Rep. 307; Martin *v.* Baltimore &c. Ry., 41 Fed. Rep. 125; State *v.* Baltimore &c. Ry., 36 Fed. Rep. 655; Owens *v.* Baltimore &c. Ry., 35 Fed. Rep. 715.

binding upon him if it entitles him to receive the benefits of the relief fund, both where the employer is and is not liable at law for the injury. It is considered to be to the minor's advantage, and he cannot recover damages of the employer either at common law or under the Employers' Liability Act of England.[1]

§ 11. *Relation of Employer and Employee must exist.*

To maintain an action under the Employers' Liability Act, the person injured must have been in the employ of the defendant at the time of the injury,[2] and must also have been doing the work of the defendant, and not that of some one else, at that time.[3] The statutes of Massachusetts and of Colorado contain a qualification of this rule, however, and render the employer of an independent contractor liable in certain cases to the employees of such contractor.[4]

In Tennessee Coal Co. *v.* Hayes, 97 Ala. 201, the plaintiff's father was employed by the defendant railroad to load its coal cars at a certain price per car. The plaintiff was a minor, and was working under a request of the defendant's superintendent made to his father to assist the latter. The plaintiff's name was not on the defendant's pay-roll, and his father received his

[1] Clements *v.* London &c. Ry., [1894] 2 Q. B. 482. In Flower *v.* London &c. Ry., [1894] 2 Q. B. 65, a contract between a boy of thirteen years of age and the defendant railroad, whereby the road agreed to let him travel on the line at special rates, and he exempted it of liability for negligence, was held not binding on the minor, because it was to his detriment.

[2] Dane *v.* Cochrane Chemical Co., 164 Mass. 453 ; Georgia Pacific Ry. *v.* Propst, 85 Ala. 203.

[3] Dean *v.* East Tennessee &c. Ry., 98 Ala. 586.

[4] Toomey *v.* Donovan, 158 Mass. 232 ; *post*, §§ **93**, **94**.

pay. It was held that the plaintiff was an employee of the defendant within the meaning of the Employers' Liability Act, and was entitled to its benefit.

In Wild *v.* Waygood, [1892] 1 Q. B. 783, the plaintiff was in the general employ of a builder who was engaged in erecting a house. The defendant contracted with this builder to construct a lift in the house, and sent a joiner named Duplea to do the work. Duplea requested the builder's foreman to lend him a man to assist him, and the foreman sent the plaintiff for that purpose. There was some evidence that the defendant agreed to pay the plaintiff's wages while he was so engaged. Upon the third day of his employment, the plaintiff was injured through the negligence of Duplea. It was held that this evidence would warrant a finding that the relation of employer and employee existed between the parties, and that the defendant was liable under the English act of 1880.

§ 12. *Same. Other Illustrations.*

The mere fact that the defendant retains the right to decide how work shall be done on his premises, in his agreement with another person who hires and pays the plaintiff to do the work, does not show that the relation of employee and employer exists between the plaintiff and the defendant. In Dane *v.* Cochrane Chemical Co., 164 Mass. 453, the plaintiff was injured through the negligence of one Johnson, and he alleged that Johnson was in the employ of the defendant as superintendent. The defence was that Johnson was not in the defendant's employ, but was an independent contractor, who had hired the plaintiff, and that the

relation of employee and employer did not exist between the plaintiff and the defendant.

The testimony showed that Johnson was employed by the defendant under a continuing contract to do carpentry work which became necessary from time to time. He hired the men to do this work, among others the plaintiff, and he superintended, paid, and discharged them. The defendant paid Johnson $2.50 a day for his work, and 25 cents a day for each man employed by Johnson in addition to the amount which Johnson agreed to pay the men. Johnson furnished the tools and the defendant the material required for the work. The account between Johnson and the defendant was usually settled monthly, and Johnson paid his workmen every Saturday. Their names were not on the defendant's pay-roll, nor were they ever paid by the defendant. There was testimony which would justify the jury in finding that the defendant determined what repairs and alterations requiring carpentry work should be made, and when and how they should be made, although, when it decided upon what repairs and alterations were to be made, it usually left the manner of making them to the discretion of Johnson. It did not appear that Johnson was authorized to hire workmen on account of the defendant, or that the workmen hired by him ever understood that they were to be paid by the defendant, or that the defendant or Johnson so understood the matter. It was held in an action under the Employers' Liability Act that the evidence would not warrant the jury in finding that the plaintiff was in the employ of the defendant, and that the defendant was not liable. The test which seems to have

controlled the court in reaching this conclusion is thus stated by Mr. Chief Justice Field, on pages 456, 457: "Could the plaintiff have recovered his wages of the defendant if they had not been paid by Johnson? Did Johnson hire the plaintiff on his own account, or as agent for the defendant? . . . The fact that the defendant retained the right to decide how work should be done on its premises does not of itself make the workmen employed by Johnson employees of the defendant. Apparently Johnson employed whom he pleased, and directed the men employed by him in the performance of their work, whether upon the premises of the defendant or upon other premises where he might be doing work. On the evidence we do not think that the jury could properly find that the relation of employee and employer existed between the parties."

The performance of a single casual service by the plaintiff, at the request of the defendant's conductor, does not create the relation of employer and employee between the parties.

In Georgia Pacific Ry. *v.* Propst, 85 Ala. 203, a night-watchman was requested by the conductor of a freight train to make a coupling, and, while attempting to do so, was injured. On a former appeal of this case it was held that in case of emergency the conductor had implied authority to hire brakemen,[1] and the plaintiff contended that the conductor's request to couple the cars constituted a contract of employment which was binding upon the defendant. But the court held that "more is essential than a mere order or request to

[1] Georgia Pacific Ry. *v.* Propst, 83 Ala. 518.

couple cars at one time and place, or doing a single act, to constitute an employment within the scope of the implied authority of the conductor. It must be to render service to some extent continuous in its nature."[1] It was accordingly decided that the plaintiff could not recover under the statute.

As to when the relation of employer and employee does or does not exist, see, also, the cases cited below.[2]

§ 13. "*As if the Employee had not been in the Service of the Employer.*"

The Massachusetts act provides that in certain specified cases an employee shall have the same right of compensation and remedies against his employer "as if the employee had not been an employee of nor in the service of the employer, nor engaged in its work."[3] "In other words, in the cases specified the defence of common employment with the person through whose negligence the injury was caused is taken away."[4]

The Alabama act of 1885 declares that the employer

[1] Per Clopton, J., for the court, p. 207.

[2] Shea *v.* Gurney, 163 Mass. 184; Morgan *v.* Sears, 159 Mass. 570; Reagan *v.* Casey, 160 Mass. 374; Huff *v.* Ford, 126 Mass. 24; Forsyth *v.* Hooper, 11 Allen, 419; Johnson *v.* Boston, 118 Mass. 114; Kimball *v.* Cushman, 103 Mass. 194; Ward *v.* New England Fibre Co., 154 Mass. 419; Corbin *v.* American Mills, 27 Conn. 274; Hexamer *v.* Webb, 101 N. Y. 377; McCafferty *v.* Spuyten-Duvil &c. Ry., 61 N. Y. 178; Speed *v.* Atlantic & Pacific Ry., 71 Mo. 303; Schwartz *v.* Gilmore, 45 Ill. 455; Cincinnati *v.* Stone, 5 Ohio St. 38; Railroad Co. *v.* Hanning, 15 Wall. 649; Water Co. *v.* Ware, 16 Wall. 566; Philadelphia &c. Ry. *v.* Bitzer, 58 Md. 372; Phillips *v.* Chicago &c. Ry., 64 Wis. 475; Cameron *v.* Nystrom, [1893] A. C. 308.

[3] St. 1887, ch. 270, § 1, cl. 3.

[4] Coffee *v.* New York &c. Ry., 155 Mass. 21, 22, per Allen, J., for the court.

is liable to the employee "as if he were a stranger, and not engaged in such service or employment." In construing this clause, the Supreme Court of Alabama has said: —

"The expression, 'as if he were a stranger,' is inapt, and literally interpreted, would put the employee in the position of a trespasser, or mere licensee; but it is apparent that such is not the intention, shown by the succeeding words, 'and not engaged in such service or employment.' The purpose of the statute is, to protect the employee against the special defences growing out of, and incidental to, the relation of employer and employee; and the result is to take from the employer such special defences, but to leave him all the defences which he has by the common law against one of the public, not a trespasser nor a bare licensee." [1]

In Thomas *v.* Quartermaine, 18 Q. B. D. 685, 700, Fry, L. J., says: "If the workman is to have the same rights as if he were not a workman, whose rights is he to have? Who are we to suppose him to be? I think that we ought to consider him to be a member of the public entering on the defendant's property by his invitation." In the same case Bowen, L. J., says on pages 693, 694: "The true view in my opinion is that the act, with certain exceptions, has placed the workman in a position as advantageous as, but no better than, that of the rest of the world who use the master's premises at his invitation on business. If it has created any further or other duty to be fulfilled by the master, I do not know what it is, how it is to be defined, or who is to define it."

[1] Mobile &c. Ry. *v.* Holborn, 84 Ala. 133, 136, per Clopton, J.

§ 14. *Actions against Municipal Corporations.*

The Massachusetts and Alabama acts apply to cities and towns, and give a right of action against them to their employees in certain cases, as for negligence in digging a trench.[1]

The statute, however, merely gives the employee "the same right of compensation and remedies against the employer as if the employee had not been an employee of nor in the service of the employer, nor engaged in its work." His rights are no greater than those of a traveller on a public highway within the limits of the city or town. When the act complained of is the neglect of a public duty imposed upon the city or town by law for the benefit of the public, and from the performance of which it receives no profit or advantage, it is not liable in damages for a personal injury received either by a traveller[2] or by an employee. Hence, where a lineman employed on the fire-signal system of a city was injured by the breaking of a pole to which the wires were attached, it was held that the city was not liable under the Massachusetts act, though the breaking was due to the negligence of the city.[3] So, where a city employee is injured through the negligence of the superintendent or assistant superintendent of streets, it has been held in Massachusetts that the city is not liable under the Employers' Liability Act, because the negligence was

[1] Connolly *v.* Waltham, 156 Mass. 368 ; Conroy *v.* Clinton, 158 Mass. 318 ; Hennessy *v.* Boston, 161 Mass. 502 ; Sheffield *v.* Harris, 101 Ala. 564 ; 14 So. Rep. 357.

[2] Hafford *v.* New Bedford, 16 Gray, 297 ; Fisher *v.* Boston, 104 Mass. 87 ; Hill *v.* Boston, 122 Mass. 344.

[3] Pettingell *v.* Chelsea, 161 Mass. 368.

that of a public officer, and the statute does not change the law of agency;[1] but the contrary has been decided in Alabama under its statute.[2]

But where the duty is not imposed by law, but is voluntarily assumed by the city or town, and especially if it receives payment or part payment from the abutters for any special advantages, such as sewers, the duty performed is not a public duty within the meaning of the rule exempting the city or town from liability, and it will therefore be liable to an employee who is injured through its negligence or that of its officers.[3]

A town or city may be estopped to deny the legality of the appointment of a superintendent in an action against it by an employee under the Employers' Liability Act. If the person serves the city in the capacity of superintendent of the work in question, and the city authorities acquiesce in such service and take the benefit of his skill and labor, it will not be heard to deny the legality of his appointment, and it will be responsible for his acts done within the scope of the service. It cannot appropriate the benefit and repudiate the burden.[4]

§ 15. *Judgment and Settlement by Consent of Next Friend of Minor Employee.*

Under the Alabama statute it has been held that the next friend of a minor employee cannot compromise a suit brought on behalf of the minor for personal inju-

[1] McCann *v.* Waltham, 163 Mass. 344.

[2] Sheffield *v.* Harris, 101 Ala. 564; 14 So. Rep. 357; Lewis *v.* Montgomery, 103 Ala. 000; 16 So. Rep. 34.

[3] Coan *v.* Marlborough, 164 Mass. 206; 41 N. E. Rep. 238; Murphy *v.* Lowell, 124 Mass. 564; Child *v.* Boston, 4 Allen, 41, 52.

[4] Sheffield *v.* Harris, 101 Ala. 564; 14 So. Rep. 357.

ries, and that a judgment by consent of the next friend is not binding on the minor, and is no bar to another action for the same injury.[1]

In Massachusetts the contrary rule prevails, that a judgment entered by consent of the next friend concludes the minor, and bars another action by him on the same cause of action, although a settlement made out of court by the next friend, and not approved by the court, does not conclude the minor, and is not admissible against the minor either in bar or on the question of damages.[2] The method now generally practised is to submit the agreement for judgment, signed by the parties, to the court for approval.

As to the power of a next friend to compromise a suit, see, also, the cases cited below.[3]

§ 16. *Suits in Federal Courts under State Statute.*

Suits to enforce a right given by the Employers' Liability Act may be brought in the federal courts as well as in the state courts.[4] The fact that the right is unknown to the common law, and is created only by state statute, does not prevent the federal courts from trying the case. Even if the statute declares that the action shall be brought only in a state court, this does not oust the jurisdiction of the federal courts.[5] Nor is it neces-

[1] Tennessee Coal Co. *v.* Hayes, 97 Ala. 201.

[2] Tripp *v.* Gifford, 155 Mass. 108.

[3] Clark *v.* Crout, 34 So. Car. 417; Crotty *v.* Eagle, 35 W. Va. 143; Baltimore & Ohio Ry. *v.* Fitzpatrick, 36 Md. 619; Kingsbury *v.* Buckner, 134 U. S. 650; Tucker *v.* Dabbs, 12 Heisk. (Tenn.) 18; Miles *v.* Kaigler, 10 Yerger (Tenn.), 10; Smith *v.* Redus, 9 Ala. 99; Isaacs *v.* Boyd, 5 Porter (Ala.), 388.

[4] Griffin *v.* Overman Wheel Co., 61 Fed. Rep. 568.

[5] Railway Co. *v.* Whitton, 13 Wall. 270.

sary that the federal court selected for action should sit within the State whose statute confers the right of action. As the action is of a transitory nature, the right may be enforced in any circuit court of the United States having jurisdiction of the subject-matter and of the parties.[1]

In some cases the federal courts are more favorable to the plaintiff than the state courts. Thus, in those courts the burden is upon the defendant to prove that the plaintiff was not in the exercise of due care at the time of the injury,[2] while in the state courts of Massachusetts,[3] and some other States,[4] the burden is upon the plaintiff to show that he was in the exercise of due care at that time. Hence, when the plaintiff fears the defence of contributory negligence or want of due care, he is more likely to recover a verdict in the federal court than in any state court where this rule prevails. Although the strictness of this rule has been relaxed somewhat in Massachusetts in the case of the killing of an employee, when all the circumstances attending the injury are in evidence and they fail to show any fault on the part of the deceased, still that the federal rule is more advantageous for the plaintiff is shown by comparing the case of Griffin *v.* Overman Wheel Co. 61 Fed. Rep. 568, with Tyndale *v.* Old Colony Ry., 156

[1] Dennick *v.* Railroad Co., 103 U. S. 11; Northern Pacific Ry. *v.* Babcock, 154 U. S. 190.

[2] Railroad Co. *v.* Gladmon, 15 Wall. 401; Texas & Pacific Ry. *v.* Volk, 151 U. S. 73, 77.

[3] Shea *v.* Boston & Maine Ry., 154 Mass. 31; Browne *v.* New York &c. Ry., 158 Mass. 247; Murphy *v.* Deane, 101 Mass. 455.

[4] Evansville Ry. *v.* Hiatt, 17 Ind. 102; Park *v.* O'Brien, 23 Conn. 339; Merrill *v.* Hampden, 26 Me. 234; Cordell *v.* N. Y. Central Ry., 75 N. Y. 330; Dyer *v.* Talcott, 16 Ill. 300.

Mass. 503; Irwin *v.* Alley, 158 Mass. 249; Chandler *v.* New York &c. Ry., 159 Mass. 589; and Felt *v.* Boston & Maine Ry., 161 Mass. 311.

§ 17. *Same. Adopt Construction given to State Statute by State Court.*

When an action for personal injuries is brought in a federal court sitting in the State where the injury was received and under its statute, the federal court is bound to follow the construction given to that statute by the highest state court. This is not a question of general law or jurisprudence, but merely of local law, and § 721 of the U. S. Revised Statutes applies to the case.[1]

Even when the federal court sits in a State other than that of the injury, the construction given to a statute of the State of injury by its highest court is binding upon the federal courts. A brakeman was injured in North Dakota through the negligence of the conductor. Action was brought in a federal court sitting in Minnesota. Under a statute of North Dakota, as construed by its highest court, the common employer was not liable to the brakeman for the negligence of the conductor. The United States Circuit Court of Appeals for the eighth circuit held that this construction was binding upon the federal court and prevented a recovery.[2]

[1] Bucher *v.* Cheshire Ry., 125 U. S. 555; Detroit v. Osborne, 135 U. S. 492; Chicago &c. Ry. *v.* Stahley, 62 Fed. Rep. 363.

This statute provides that "the laws of the several States, except when the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." 1 Stats. 92.

[2] Northern Pacific Ry. *v.* Hogan, 63 Fed. Rep. 102.

When, however, the action is brought in a federal court sitting in a State other than that in which the injury was received, and under a statute of the State of injury, the federal court is not bound to follow the construction given to that statute by the courts of the State in which it sits, but may enforce the statute of such other State, although the local state courts have refused to enforce it.[1]

§ 18. *Same. Enforcing Statutes of Other States.*

In the matter of enforcing a right of action given by a statute of another State for a personal injury received there, the federal courts construe the statute more favorably to the plaintiff than do the state courts of Massachusetts and of some other States. The recognition of a statute of another State depends upon the principles of interstate comity, which principles have always been cherished by the federal courts,[2] and sometimes disregarded by the state courts. Thus, in Dennick *v.* Railroad Co., 103 U. S. 11, it was held that an administrator appointed in New York of a person killed in New Jersey through defendant's negligence could maintain an action in the federal court sitting in New York under a statute of New Jersey which made any person or corporation whose wrongful act, neglect, or default should cause the death of any person liable to an action by his administrator for the benefit of his widow and next of kin. In several state courts, however, like statutes of other States have been refused recognition and enforcement.[3]

[1] Texas & Pacific Ry. *v.* Cox, 145 U. S. 593 ; *post*, § 18.

[2] Bank of Augusta *v.* Earle, 13 Peters, 519.

[3] Richardson *v.* New York Central Ry., 98 Mass. 85 ; Woodard *v.*

Again, the question of whether a statute of another State shall be enforced is a question of general law or jurisprudence; and therefore the federal courts are not bound to follow the construction given to such statute by the courts of the State in which they sit. Hence a decision by a state court, that no action can be maintained under a statute of another State, is not binding upon a federal court sitting in the first State in another like case. In Texas & Pacific Ry. *v.* Cox, 145 U. S. 593, a freight conductor in the employ of the railroad company was killed in Louisiana through the negligence of the company. His widow brought this action in the United States Circuit Court for Texas to recover damages under the Louisiana statute. Several decisions of the Supreme Court of Texas were cited,[1] tending to support the view that an action could not be maintained in Texas on a statute of another State like that of Louisiana. But the Supreme Court of the United States refused to be bound by the Texas decisions upon the ground that the question was one of "general law" (page 605), and gave judgment for the plaintiff on the authority of Dennick *v.* Railroad Co., 103 U. S. 11. In Huntington *v.* Attrill, 146 U. S. 657, 683, the Cox case was cited by the court in support of the proposition that, "If the suit is brought in a circuit court of the United States, it is one of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions."[2]

Michigan Southern Ry., 10 Ohio St. 121; McCarthy *v.* Chicago &c. Ry., 18 Kans. 46; Taylor *v.* Pennsylvania Ry., 78 Ky. 348.

[1] Willis *v.* Missouri Pacific Ry., 61 Texas, 432; Texas & Pacific Ry. *v.* Richards, 68 Texas, 375; St. Louis &c. Ry. *v.* McCormick, 71 Texas, 660.

[2] See, also, Northern Pacific Ry. *v.* Babcock, 154 U. S. 190, 198.

§ 19. *Federal Courts are not bound by State Decisions as to who are Fellow-Servants.*

In the absence of state legislation, the question whether the engineer and fireman running a locomotive engine without a train attached are fellow-servants, so as to relieve the railroad company from liability to the fireman by reason of the engineer's negligence, is not a question of local law upon which the federal courts are bound to follow the state decisions, but is one of general law upon which the federal courts may exercise their independent judgment, uncontrolled by local decisions.[1] In delivering the court's opinion in the first case cited below, Mr. Justice Brewer says on page 378: "But passing beyond the matter of authorities, the question is essentially one of general law. It does not depend upon any statute; it does not spring from any local usage or custom; there is in it no rule of property, but it rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the 'common law.' There is no question as to the power of the States to legislate and change the rules of the common law in this respect as in others; but in the absence of such legislation the question is one determinable only by the general principles of that law. Further than that, it is a question in which the nation as a whole is interested. It enters into the commerce of the country. Commerce between the States is a matter of national regulation, and to establish it as such was one

[1] Baltimore & Ohio Ry. *v.* Baugh, 149 U. S. 368; Hough *v.* Railway Co., 100 U. S. 213, 226.

of the principal causes which led to the adoption of our Constitution."

§ 20. *Suit in Admiralty Court for Maritime Tort.*

Whether or not an admiralty court sitting within a State where an injury occurs will enforce a new right of action, given by an Employers' Liability Act of that State, has not been decided.

It has been held, however, that the admiralty courts will enforce a state statute giving a right of action for death by negligence. If the negligence is a maritime tort, the suit may be maintained either *in rem* or *in personam*.[1]

[1] Holmes *v.* Oregon &c. Ry., 5 Fed. Rep. 75 ; The Clatsop Chief, 8 Fed. Rep. 163 ; The E. B. Ward, Jr., 17 Fed. Rep. 456. *Contra*, as to suit *in rem*, The Vera Cruz, 10 App. Cases, 59.

CHAPTER II.

DEFECTS IN THE CONDITION OF THE WAYS, WORKS, ETC.

Section
21. Statutory provisions and preliminary remarks.
22. General effect of this clause in Massachusetts.
23. General effect of this clause in Alabama.
24. Actual or presumptive knowledge of defect by defendant or his proper officers.
25. Employee's knowledge of defect or negligence.
26. Defect must be proximate cause of injury.
27. Accidental and temporary obstruction.
28. Proper appliances within reach.
29. Latent defect.
30. Hidden danger in the ways, works, or machinery.
31. Injury not caused by defect alleged.
32. Machinery need not be the safest or best known in use.
33. Absence of guards, cleats, rails, etc.
34. Same.
35. Miscellaneous cases.

§ 21. *Statutory Provisions and Preliminary Remarks.*

Section 1, clause 1, of the Massachusetts act gives a right of action to an employee who receives personal injury "by reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer," provided that the defective condition "arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer and entrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition."

The Alabama statute has a provision to the same effect, under which it has been decided that the mere

fact that an employee is injured by reason of a defect in the condition of the employer's ways, works, machinery, or plant does not render the employer liable: it must further appear that the defect in the condition "arose from, or had not been discovered or remedied owing to, the negligence of the master or employer, or of some other person in the service of the master or employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition." [1]

It is, however, an essential part of the plaintiff's case to prove a defect in the condition of such ways, works, machinery, or plant; and if he fails to do so, he cannot recover under this clause of the statute.[2] The question considered in this chapter is, What is a "defect in the condition" within the meaning of this clause?

§ 22. *General Effect of this Clause in Massachusetts.*

This provision made very little if any enlargement to the rights of an employee as they existed at common law in Massachusetts. It is chiefly a legislative declaration of common-law principles. In Ryalls *v.* Mechanics' Mills, 150 Mass. 190, 194, Mr. Justice Holmes, speaking for the court, says: —

[1] Alabama Code, § 2590; Memphis &c. Ry. *v.* Askew, 90 Ala. 5; Louisville &c. Ry. *v.* Coulton, 86 Ala. 129; Louisville &c. Ry. *v.* Davis, 91 Ala. 487.

[2] Louisville &c. Ry. *v.* Binion, 98 Ala. 570, 575. Under the clauses relating to the negligence of a superintendent, or of a person in charge or control of a signal, switch, locomotive engine, or train, it is not necessary to prove a defect in the condition of the ways, works, machinery, or plant. A superintendent's negligence may also consist in allowing a defect to arise or to continue in existence. Seaboard Manuf. Co. *v.* Woodson, 94 Ala. 143.

"In 1887 [before the passage of the act], it was settled law in Massachusetts that masters were personally bound to see that reasonable care was used to provide reasonably safe and proper machinery, so that, if the duty was entrusted to another and was not performed, the fact that the proximate cause of the damage was the negligence of a fellow-servant was no defence.[1] The rule in Wilson *v.* Merry, L. R. 1 H. L. Sc. 326, practically, if not in terms, had been modified very much in favor of servants." [2]

In Spicer *v.* South Boston Iron Co., 138 Mass. 426, the plaintiff, while in the employ of the defendant, was injured by the breaking of an iron hook, and there was evidence that the hook had a visible flaw or crack in it, which a careful inspection would have revealed. It was held in an action at common law that there was sufficient evidence of negligence on the part of the defendant to support a verdict for the plaintiff.

This duty of the employer was not, by the common law of Massachusetts, confined strictly to machinery, but also extended to all appliances and instrumentalities connected with his business. In Snow *v.* Housatonic Ry., 8 Allen, 441, it was held that a railroad corporation was liable at common law to one of its employees for an injury caused by a want of repair in the roadbed of the railroad. The employer could not escape liability by delegating this duty to some one else, and was liable for its non-performance to every employee who was not himself negligent.

[1] Citing Gilman *v.* Eastern Ry., 13 Allen, 433, 440; and Lawless *v.* Connecticut River Ry., 136 Mass. 1. See, also, Toy *v.* United States Cartridge Co., 159 Mass. 313.

[2] Citing Rogers *v.* Ludlow Manuf. Co., 144 Mass. 198, 202.

So, a railroad company is liable to a brakeman in its employ for an injury caused by a worm-eaten and rotten stake used to hold railroad ties upon a platform car, and to facilitate the passage of brakemen from car to car; and the facts that the stake was prepared by fellow-workmen, and that the defendant supplied sufficient good lumber for the purpose, will not relieve the defendant from liability at common law.[1]

The employer was also liable for negligence in failing to provide proper and competent co-employees to carry on his business. Thus, in Gilman *v.* Eastern Ry., 13 Allen, 433, a railroad company was held liable to one of its car-repairers for retaining in its employ an habitual drunkard as a switchman, whose negligence in failing to properly adjust a switch caused the plaintiff's injury, after it knew, or by the use of due care might have known, that he was a drunkard.

The above rules of the common law are still in force in Massachusetts, for the Employers' Liability Act does not repeal or restrict them, but on the contrary it enlarges and increases in certain directions the rights of employees and the liabilities of employers.

§ 23. *General Effect of this Clause in Alabama.*

In Wilson *v.* Louisville &c. Ry., 85 Ala. 269, 272, the court says by Mr. Justice Clopton: "Under the statute, negligence in causing or failing to discover or remedy a defect is essential to liability. It does not undertake to define what shall constitute a defect or negligence in regard to the condition of the ways, works, machinery, or plant. To determine these mat-

[1] McIntyre *v.* Boston & Maine Ry., 163 Mass. 189.

ters, reference must be made to the principles of the common law. Therefore, whether the plaintiff's right to recovery is based on the statutory or common-law liability of an employer, the measure of defendant's duty to plaintiff is essentially the same."

§ 24. *Actual or Presumptive Knowledge of Defect by Defendant or his Proper Officers.*

At common law, an employee cannot maintain an action against his employer for an injury caused by a defect in the ways, works, machinery, or plant, unless the employer knew of the defect, or by the exercise of reasonable care might have known of the defect in time to remedy it before the accident.[1] But the circumstances may be such as to raise a presumption of knowledge on the part of the employer, and to relieve the plaintiff of the obligation of proving actual knowledge;[2] or they may be such as to charge the employer with negligence in failing to discover and remedy the defect.[3]

A like rule prevails in actions under the Employers' Liability Acts.

It has been held under the Alabama act that mere knowledge of a defect by the employer, or by the person entrusted with the duty of seeing that the ways,

[1] Reed *v.* Boston & Albany Ry., 164 Mass. 129; Nason *v.* West, 78 Me. 253; Griffiths *v.* London &c. Docks Co., 12 Q. B. D. 495; s. c., 13 Q. B. D. 259; Hayden *v.* Smithville Manuf. Co., 29 Conn. 548; Carruthers *v.* Chicago &c. Ry., 55 Kans. 600; 40 Pac. Rep. 915; Atchison &c. Ry. *v.* Wagner, 33 Kans. 660; Wright *v.* New York Central Ry., 25 N. Y. 562, 566.

[2] Guthrie *v.* Maine Central Ry., 81 Me. 572.

[3] Moynihan *v.* Hills Co., 146 Mass. 586; Toy *v.* United States Cartridge Co., 159 Mass. 313; Cowan *v.* Chicago &c. Ry., 80 Wis. 284.

works, etc., were in proper condition, will not render the employer liable for an injury caused by such defect; it must further appear that a reasonable time had elapsed after the discovery of the defect and before the injury to make repairs, or to remedy the defect. Thus, in Seaboard Manuf. Co. *v.* Woodson, 94 Ala. 143; s. c., 98 Ala. 378, a fireman, while oiling and cleaning a locomotive engine, was injured by a leaky throttle-valve of the engine, which caused it to start up while he was underneath it. One count of his declaration alleged that this defect was known to the superior officers of the plaintiff, and was known to the defendant, but failed to state how long before the injury the defect had been known to the defendant or to the plaintiff's superiors. It was held on demurrer that this count did not state a cause of action, for the reasons above stated. In delivering the opinion, Mr. Justice Walker says, on page 147: "Unless there had been a reasonable opportunity to effect a remedy, it could not be said that the failure to do so was negligent. The defendant must have had sufficient time to remedy the defect after its discovery before it could be chargeable with negligence in failing to effect such remedy. Mere knowledge, without the opportunity to act on it, would not constitute negligence."[1]

Under a like clause in the English act, it has been held that the only defects for which an employer is liable are such as imply negligence on his part, or of some one in his employ entrusted by him with the duty of seeing that the ways, works, machinery, or plant are in proper condition. Therefore, where the plaintiff, while

[1] See, also, United States Rolling Stock Co. *v.* Weir, 97 Ala. 396.

working upon a carding-machine, had his thumb cut off by its slipping through a hole in the disk of the wheel, which kind of wheel was in common use, though there was another kind without holes, it was decided by the court of appeal, Lord Esher, M. R., dissenting, that the plaintiff could not recover, as the defect did not imply negligence.[1]

§ 25. *Employee's Knowledge of Defect or Negligence.*

The fifth section of the Massachusetts act declares that —

"An employee or his legal representatives shall not be entitled under this act to any right of compensation or remedy against his employer in any case where such employee knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer who had entrusted to him some general superintendence."

The Alabama and English acts contain the above provision in substance, with the following added at the end thereof: "unless he [the employee] was aware that the master or employer, or such superior, already knew of such defect or negligence."

This section does not create a condition precedent, like that of due notice, which the plaintiff must allege and prove has been fulfilled. Knowledge and failure to inform are matters of defence, and the burden is upon the defendant to show them.[2]

[1] Walsh *v.* Whiteley, 21 Q. B. D. 371.

[2] Connolly *v.* Waltham, 156 Mass. 368.

The same rule prevails under the English act.[1]

Under the Alabama act the plaintiff is not obliged to allege or prove that he was aware that the defendant had no knowledge of the defect, and that the plaintiff, while having knowledge thereof himself, failed to communicate the fact to the defendant or to some superior employee. This is purely matter of defence, relating to contributory negligence of the plaintiff, and the defendant must show it.[2]

The rule of the common law was that the employee's knowledge of the defect causing the injury was not, as matter of law, conclusive evidence of such want of due care as would prevent a recovery from the employer. This was a question for the jury to decide on all the facts and circumstances of the case. If he informed the proper officer of the defect, and was told that it would be remedied, his subsequent use of the appliance within a reasonable time in the defective condition did not constitute negligence on his part, or an assumption of the risk, which would prevent his recovery.[3]

In Alabama, however, it was held at common law

[1] Weblin *v.* Ballard, 17 Q. B. D. 122, 125.

[2] Columbus &c. Ry. *v.* Bradford, 86 Ala. 574.

[3] Snow *v.* Housatonic Ry., 8 Allen (Mass.), 441; Ford *v.* Fitchburg Ry., 110 Mass. 240; Hough *v.* Railway Co., 100 U. S. 213; Laning *v.* New York Central Ry., 49 N. Y. 521; Patterson *v.* Pittsburg &c. Ry., 76 Pa. St. 389; Conroy *v.* Vulcan Iron Works, 60 Mo. 35; Flynn *v.* Kansas City &c. Ry., 78 Mo. 195; Indianapolis &c. Ry. *v.* Ott, 11 Ind. App. 564; 38 N. E. Rep. 842; Clarke *v.* Holmes, 7 H. & N. 937; Union Manuf. Co. *v.* Morrissey, 40 Ohio St. 148; Missouri Furnace Co. *v.* Abend, 107 Ill. 44; Southern Kansas Ry. *v.* Croker, 41 Kans. 747; Greene *v.* Minneapolis &c. Ry., 31 Minn. 248. For qualifying cases, see Counsell *v.* Hall, 145 Mass. 468; Lewis *v.* New York &c. Ry., 153 Mass. 73; Westcott *v.* New York &c. Ry., 153 Mass. 460; Levesque *v.* Janson, 165 Mass. 16; 42 N. E. Rep. 335.

that, where an employee knew of a defect and remained at work after the employer had broken his promise to remedy the defect, he was guilty of contributory negligence as matter of law, and could not recover for an injury caused by such defect.[1]

In an early case under the statute, it was held that this rule was abrogated by the Employers' Liability Act of 1885, on the ground that it was the intention of the act to remedy the injustice to the employee of requiring him to abandon his employment, or to waive his rights against an employer who has neglected to remedy the defect within a reasonable time after notice thereof.[2] In a later case, however, this decision has been expressly overruled, and it is now held in Alabama that continuance in the service of the defendant with knowledge of a defect in the condition of the ways, works, or machinery, though it exists in another department over which the employee has no control, constitutes an assumption of the risk after the lapse of a reasonable time for remedying the defect, and that the doctrine of *volenti non fit injuria* applies, and prevents a recovery under the statute.[3]

§ 26. *Defect must be Proximate Cause of Injury.*

The Alabama decisions hold strictly to the rule that when the plaintiff's cause of action is based upon a defect in the condition of his employer's ways, works, machinery, or plant, it must appear that such defect was the proximate and not the remote cause of the injury.[4]

[1] Eureka Co. *v.* Bass, 81 Ala. 200.

[2] Mobile &c. Ry. *v.* Holborn, 84 Ala. 133.

[3] Birmingham Ry. *v.* Allen, 99 Ala. 359.

[4] Tuck *v.* Louisville &c. Ry., 98 Ala. 150; Louisville &c. Ry. *v.* Binion, 98 Ala. 570.

In Ashley *v.* Hart, 147 Mass. 573, the plaintiff and one K, both of whom were journeymen painters, were employed by the defendant to paint another person's house, and were furnished by the defendant with a hanging stage. K omitted to fasten his end of the stage securely, and while it was being lowered into position it fell and injured the plaintiff. In an action under the act it was held that the injury was not caused by a defect in the condition of the stage, but by the negligence of a fellow-servant, and that the plaintiff could not recover.

§ 27. *Accidental and Temporary Obstruction.*

The Employers' Liability Act does not make the employer liable for every accidental and temporary obstruction which arises in the progress of the work. This is not such a defect in the condition of his ways, works, or machinery as is contemplated by the statute. To give a right of action, the defect must be something in the permanent or quasi-permanent condition of the ways, works, or machinery.[1]

In O'Connor *v.* Neal, *ubi supra*, a pile of rubbish had collected on the floor of a room of which the plaintiff, a mason, was pointing the windows. His assistant, a common laborer, placed one end of his staging on this rubbish, so that it rested unevenly on the floor, and when the plaintiff stepped upon the staging it tipped and caused him to fall. In delivering the court's opinion, Morton, J., says: —

"Under the Employers' Liability Act (St. 1887, ch.

[1] O'Connor *v.* Neal, 153 Mass. 281, 283; McGiffin *v.* Palmer's Shipbuilding Co., 10 Q. B. D. 5; May *v.* Whittier Machine Co., 154 Mass. 29.

270), the presence of the rubbish on the floor could not be said to constitute a defect in the ways, works, or machinery. It was merely accidental and temporary, and nothing for which the defendants could be held liable." Page 283.

In McGiffin *v.* Palmer's Shipbuilding Co., 10 Q. B. D. 5, a workman was killed by the fall of a heavy ball which had been negligently left in the roadway of the defendants' iron works. It was held that this was a mere temporary obstruction in the roadway, and was not such a defect in the condition of the way within the meaning of the statute, because it was not of a permanent or quasi-permanent character.[1]

In May *v.* Whittier Machine Co., 154 Mass. 29, it was held that a pile of small pieces of wood about a foot high and eight and one quarter inches wide, which had been placed in a space between machines in the defendant's works by a fellow-servant, was an obstruction of "an accidental and temporary character," and did not constitute a defect in the condition of the ways for which the employer was liable.

The presence of a stone upon a staging used in the construction of a building is not a defect in the condition of the ways, works, or machinery within the meaning of the Massachusetts act.[2]

In Alabama it was held in an early case that a pile of coal dumped near a railroad track, at the request of a manufacturer of bricks, may constitute a defect in the

[1] In this case it was also held that if the person who left the ball in the roadway was the defendant's superintendent, the action could be maintained under the superintendence clause of this act. See, also, Kansas City &c. Ry. *v.* Burton, 97 Ala. 240, 248.

[2] Carroll *v.* Willcutt, 163 Mass. 221.

condition of the "ways" of the railroad company within the meaning of the statute.[1] But this case has been expressly overruled, and the Alabama rule is now substantially like that of England and of Massachusetts.[2] In Kansas City &c. Ry. *v.* Burton, *supra*, it was held that a railroad car left on one track in dangerous proximity to another track is not a defect in the condition of the "ways" of the employer within the statute, because it is merely a temporary obstruction, and not an inherent part of the ways.

§ 28. *Proper Appliances within Reach.*

An employer who furnishes proper tools or appliances, within convenient reach, is not liable to an employee who is injured while using a defective tool or instrument. In supplying proper instruments the employer has done his whole duty, and is not liable either at common law,[3] or under this clause of the statute.[4]

In Thyng *v.* Fitchburg Ry., 156 Mass. 13, a freight brakeman was thrown off a train and killed by its breaking apart, caused by the use of too short a coupling-pin. The defendant always kept a supply of pins in the yard and in the caboose of the train, and a proper one could have been found in either of those places by

[1] Highland Avenue Ry. *v.* Walters, 91 Ala. 435, 444.

[2] Kansas City &c. Ry. *v.* Burton, 97 Ala. 240, 247.

[3] Carroll *v.* Western Union Tel. Co., 160 Mass. 152; Johnson *v.* Boston Tow-Boat Co., 135 Mass. 209; McKinnon *v.* Norcross, 148 Mass. 533.

[4] Thyng *v.* Fitchburg Ry., 156 Mass. 13; Allen *v.* Smith Iron Co., 160 Mass. 557.

If a superintendent is negligent in not furnishing proper tools or appliances, the employer may be liable under another clause of the statute.

the men who made up the train. In an action under the statute by the brakeman's administratrix, it was held that the failure to select a proper pin under the circumstances was not an act for which the defendant was liable.

In Allen *v.* Smith Iron Co., 160 Mass. 557, a furnace attendant was killed by the breaking of a wooden lever held by a fellow-workman, which allowed the iron door to the furnace to swing down and strike the deceased. There was no evidence that the wooden lever was defective, except that it broke, and had been in use for a long time. The employer kept a stock of lumber of the proper size on hand, and the deceased could have obtained a new lever at any time by asking for it. He was the person in immediate charge of the furnace. In an action under the statute by the administratrix, it was held that the plaintiff could not recover. Holmes, J., for the court, says: "If such a stick can be said to be part of the works or machinery, the defendant's duty to the deceased did not require it to see that he called for a proper one. It was enough that it had proper ones within convenient reach." Page 558.

The mere fact that a wooden lever or other instrument breaks while in ordinary use is not sufficient evidence of a "defective condition," within the Employers' Liability Act, to justify a verdict for the plaintiff.[1]

If the machinery or appliances furnished by the employer are defective, he is liable to an employee, who is in the exercise of due care, for an injury caused by such defective machinery or appliances.[2]

[1] Allen *v.* Smith Iron Co., 160 Mass. 557.

[2] Mooney *v.* Conn. River Co., 154 Mass. 407.

§ 29. *Latent Defect.*

The doctrine is well settled at common law that an employer is not liable for an injury caused by a hidden or latent defect which was not discoverable by the exercise of reasonable care or inspection on his part.[1]

A like rule applies in actions under the Employers' Liability Act.[2] In Louisville &c. Ry. *v.* Campbell, 97 Ala. 147, a brakeman was thrown from a train while in motion by the breaking of a brake-rod. The place where the rod broke was about half bright and new and about half rusty and old, showing that the defect had existed for some time. The old break or crack was located under the ratchet-wheel, and between it and the bar or plate of iron on which the wheel rested, and could not have been seen or detected without taking out the rod-key underneath, and raising the rod several inches until the point where the crack was rose above the ratchet-wheel. The car had been inspected in the usual manner on the day of the accident, and during the run of one hundred and fifty miles just prior to the accident the plaintiff had himself applied the brake eight or ten times without noticing anything wrong about it.

In an action under the Alabama act, it was held that

[1] Louisville &c. Ry. *v.* Allen, 78 Ala. 494 ; Holland *v.* Tennessee Coal Co., 91 Ala. 444 ; Roughan *v.* Boston Block Co., 161 Mass. 24 ; Spicer *v.* South Boston Iron Co., 138 Mass. 426, 430 ; Ladd *v.* New Bedford Ry., 119 Mass. 412, 413 ; Ingalls *v.* Bills, 9 Met. (Mass.) 1 ; Ballou *v.* Chicago &c. Ry., 54 Wis. 257 ; De Graff *v.* New York Central &c. Ry., 76 N. Y. 125.

[2] Louisville &c. Ry. *v.* Campbell, 97 Ala. 147 ; Coffee *v.* New York &c. Ry., 155 Mass. 21, 25 ; Roberts & Wallace, Employers' Liability (3d ed.), p. 249.

the defect was a hidden one which could not have been discovered or remedied with reasonable care and inspection, and that the defendant railroad was not liable.

§ 30. *Hidden Danger in the Ways, Works, or Machinery.*

A concealed or hidden danger, in the nature of a trap, in the defendant's ways, works, or machinery, constitutes a defect in their condition, within the meaning of the Employers' Liability Acts, for which the employer is liable, especially to young or inexperienced employees.

In McNamara *v.* Logan, 100 Ala. 187, a boy, while driving a mining-car down grade in a mine entry for the first time, and while running beside the car and attempting to sprag the wheels, as he had been ordered to do, was crushed between the wall and the car in a narrow space. The evidence was conflicting as to the width of the entry at this point, but the evidence for the plaintiff tended to show that the space between the wall and the car was only a foot and a half, and an expert called by the plaintiff testified that the rule was to have this space three feet wide, and that a foot and a half was unsafe. It was held that the evidence warranted a finding that there was a defect in the ways of the defendant within the meaning of the Alabama statute.

A like rule prevails at common law. It is the duty of an employer to use reasonable care to furnish safe material for his workmen. If he fails in this duty, he is liable for an injury caused thereby; and the fact that

it was rendered dangerous by the act of the plaintiff's fellow-servant does not relieve the employer from responsibility.[1]

§ 31. *Injury not caused by Defect alleged.*

Even if there be a defect in the machinery, yet, if the injury was not caused by that defect, an employee cannot recover of the master, either at common law[2] or under the Employers' Liability Act.[3]

In Brady *v.* Ludlow Manuf. Co., 154 Mass. 468, the plaintiff was injured while at work removing waste from his carding-machine in defendant's factory by a gate swinging to and pushing him upon the gears of the machine. In delivering the opinion of the court, Mr. Justice Knowlton says, on page 471: —

"The defect in the gate was that, when swung together, it would not catch on the fastening, and, if fastened, would not stay so, but would stand a little way open. . . . But the defect had no connection with the accident. If the device for fastening the gate had worked perfectly, it would have made no difference to the plaintiff, for he could not clean the gears without keeping the gate open. There was no evidence that he was injured by reason of any defect or want of repair in the defendant's machinery or appliances."

[1] Ford *v.* Fitchburg Ry., 110 Mass. 240; Holden *v.* Fitchburg Ry., 129 Mass. 268; Neven *v.* Sears, 155 Mass. 303.

[2] Sullivan *v.* Wamsutta Mills, 155 Mass. 200.

[3] Brady *v.* Ludlow Manuf. Co., 154 Mass. 468.

§ 32. *Machinery need not be the Safest or Best Known in Use.*

Neither at common law nor under the Employers' Liability Act is the employer required to furnish the safest or the best known machinery in use, or that with the latest improvements in safety appliances.[1] He performs his duty towards his employees when he furnishes machinery which is reasonably safe and adapted to the purpose for which it is used.

In Alabama it is a sufficient fulfilment of the employer's duty to adopt such machinery or appliances as are in ordinary use by prudently conducted concerns engaged in like business and surrounded by like circumstances. This rule applies to actions under the Employers' Liability Act as well as to actions at common law.[2]

§ 33. *Absence of Guards, Cleats, Rails, etc.*

Whether the absence of a guard, cleat, rail, or other form of protection from danger, constitutes a "defect in the condition" of the employer's ways, works, or machinery within the meaning of the statute, depends upon the essential nature of the object itself, and the use for which it was intended.

In Gustafsen *v.* Washburn & Moen Manuf. Co., 153 Mass. 468, a workman, while assisting in pulling a loaded car along a railroad track on the defendant's

[1] O'Maley *v.* South Boston Gas Light Co., 158 Mass. 135, 137.

[2] Richmond &c. Ry. *v.* Bivins, 103 Ala. 000; 15 So. Rep. 515, 517; Wilson *v.* Louisville &c. Ry., 85 Ala. 269; Georgia Pacific Ry. *v.* Propst, 83 Ala. 518; Louisville &c. Ry. *v.* Allen, 78 Ala. 494.

premises, fell into a ditch across the track, and was instantly killed by the car falling on top of him. The ditch was open and visible, but not guarded, and had been dug that morning without warning to the employees, who had been accustomed to use the track, among whom was the deceased. In pulling the car, the deceased was naturally obliged to lean forward and bend down towards the track. In an action under the Employers' Liability Act, it was held that, in the absence of direct evidence that the deceased knew of the ditch, the plaintiff was entitled to go to the jury on the question as to whether there was a defect in the condition of the ways used in the defendant's business which arose from its negligence.

The absence of a blocking appliance to a truck, used to transport heavy articles from one part of a floor to another, is not a defect in the condition of the tool or machine within the meaning of the Massachusetts act.[1]

In Graham *v.* Boston & Albany Ry., 156 Mass. 4, a freight brakeman, while engaged in uncoupling cars in motion, had his hand crushed by the slipping backwards of an oil-tank. As the plaintiff reached over with his right hand to pull the coupling-pin, he reached back with his left hand for a grab-iron, or handle, by which to steady himself. The car had no grab-iron, and the plaintiff took hold of the end block on the tank-car, to save himself, when the engineer started up the train, after receiving the signal. This brought his left hand near the oil-tank; and when the train was started with a jerk, the tank shifted and crushed his hand. In an

[1] O'Keefe *v.* Brownell, 156 Mass. 131.

action under the statute, it was held that whether the oil-car was defective for want of a grab-iron was a question of fact for the jury to decide.

§ 34. *Same.*

The absence of hooks or stays to a ladder, used in an engine-room for the purpose of turning on steam to a donkey-engine at some distance above the floor, may warrant a finding that there was a defect in the condition of the plant within the meaning of the English act of 1880.[1]

In an action under the Alabama act by a conductor against a dummy railroad company for personal injuries caused by his train running into an open switch, which switch had no lock or other fastening, the question whether the absence of a lock or fastener constituted a defect was held to depend upon utility and the usage and custom of well-regulated roads.[2]

Under the Massachusetts act, the absence of a latch, or lock, to a shifting-bar of a machine, to prevent it from starting automatically by the driving-belt slipping from the loose pulley on to the tight pulley, is not a defect in the condition of the employer's machinery, even if an expert testifies that the machine was dangerous without it, and a verdict should be ordered for the defendant if nothing further appears.[3]

The failure of a building contractor to shore up the wall of an old house which he is pulling down for the owner, whereby the wall falls upon one of his

[1] Weblin *v.* Ballard, 17 Q. B. D. 122.

[2] Birmingham Ry. *v.* Allen, 99 Ala. 359.

[3] Ross *v.* Pearson Cordage Co., 164 Mass. 257 ; 41 N. E. Rep. 284.

employees, is a defect in the condition of his works for which he is liable under the English act.[1]

§ 35. *Miscellaneous Cases.*

A vicious habit of kicking in a horse is a "defect" within the meaning of the English act of 1880.[2]

A plank only eight inches wide, laid upon rafters three feet apart and thirty feet above the floor of a building, upon which plank the plaintiff's intestate, a night-watchman, was required to walk in the discharge of his duties, constitutes a defect in the condition of the ways within the terms of the Alabama Employers' Liability Act.[3]

In Prendible *v.* Connecticut River Manuf. Co., 160 Mass. 131, a staging, upon which the plaintiff was standing to pile up wood, fell, and injured him. The staging was about fifteen feet high, twenty feet long, and five feet wide, and was moved from place to place, and used in piling wood. It was erected by the side of a woodpile, and was held in position by three brackets, each of which was fastened to the woodpile by six wooden cleats, one end of each cleat being nailed to the woodpile, and the other end to the upright part of the bracket. There were three nails at each end of each cleat, and the cleats were about two feet long, about two inches wide, and an inch thick. The staging was designed to hold a quantity of wood and two men. There was one prop, or support, at one end of the staging when it fell. It was held that the jury was

[1] Brannigan *v.* Robinson, [1892] 1 Q. B. 344.

[2] Yarmouth *v.* France, 19 Q. B. D. 647.

[3] United States Rolling Stock Co. *v.* Weir, 96 Ala. 396.

warranted in finding that there was a defect in the condition of the staging within the meaning of the statute; and that as this defect was not discovered or remedied, owing to the negligence of a person entrusted by the defendant with the duty of seeing that the ways, works, or machinery were in proper condition, the plaintiff was entitled to recover.

In Willetts *v.* Watt, [1892] 2 Q. B. 92, the plaintiff, while passing from one part of the defendant's workshop to another in the discharge of his duties, fell into a catchpit, the lid of which had been removed shortly before, for the first time in five years, to make some repairs. The lid was level with the floor, and was ordinarily used as part of the floor for walking. It was held by the Court of Appeal, in an action under the Employers' Liability Act, that this did not constitute a defect in the condition of the way within the meaning of the statute, but was merely a negligent user of the way by the person who caused the removal of the lid.[1] Fry, L. J., says, in his opinion, on page 100: "The way was properly constructed for a twofold purpose: the well or catchpit might be used when required, or the place might be used for general purposes, including that of a way. It was properly adapted to subserve both these purposes, and the cause of the accident was not deficient construction, but that it was negligently used for one of the purposes without notice to persons who were using it for the other."

[1] As the person who caused the removal of the lid was probably a superintendent, the plaintiff was granted the right to retry his case under sub-section 2, upon the payment of costs.

CHAPTER III.

"WAYS, WORKS, MACHINERY, OR PLANT."

Section
36. Statutory provisions.
37. Definitions and illustrations.
38. "Machinery" defined.
39. Temporary structures.
40. Works in process of construction or destruction.
41. Movable staging owned by defendant.
42. Movable stairs owned by third person.
43. Foreign car used by defendant for its own benefit.
44. Same.
45. Foreign car not used by defendant, but merely forwarded empty.
46. Railroad track of connecting road.
47. Railroad track of shipper.

§ 36. *Statutory Provisions.*

THE Massachusetts and Colorado acts relate to defects in the condition of the "ways, works, or machinery," [1] except that, in the sections respecting the liability of an employer to an employee of an independent contractor, the term "plant" is used in addition to the terms "ways, works, or machinery."

The Alabama and English acts relate to defects in the condition of the "ways, works, machinery, or plant." [2] The Indiana act relates to "ways, works, plant, tools, and machinery." [3]

[1] Mass. St. 1887, ch. 270, § 1, cl. 1; Colo. St. 1893, c. 77, § 1, cl. 1.
[2] Ala. Code of 1886, § 2590, cl. 1; 43 & 44 Vict. ch. 42, § 1, cl. 1.
[3] Ind. St. 1893, ch. 130, § 1, cl. 1.

§ 37. *Definitions and Illustrations.*

Wires forming part of a railroad's electric system of signals, so attached to the rails and sleepers as to transmit the electric current, are a part of the "ways, works, or machinery" of the railroad, within the meaning of the Massachusetts statute.[1]

To constitute a "way" within the meaning of the statute, it is not necessary that it should be marked out or defined, or that it should be habitually used as a way. In the case of a workshop it has been held that the course which the workmen ordinarily take in going from one part of the shop to another in the discharge of their duties is such a way.[2]

An "exploder" used in blasting rock, consisting of a copper covering filled with fulminate of mercury, which is bought by a quarry-owner and instantly consumed in the use of causing an explosion by electricity, is not a part of his "ways, works, or machinery," within the meaning of the Massachusetts statute.[3]

A ladder or hand-hold on a railroad freight-car is part of the ways, works, machinery, or plant, within the meaning of the Alabama statute.[4]

A horse is a part of the "plant" of a warehouseman, within the meaning of the English statute.[5]

[1] Brouillette *v.* Connecticut River Ry., 162 Mass. 198.
[2] Willetts *v.* Watt, [1892] 2 Q. B. 92.
[3] Shea *v.* Wellington, 163 Mass. 364.
[4] Louisville, &c. Ry. *v.* Pearson, 97 Ala. 211.
[5] Yarmouth *v.* France, 19 Q. B. D. 647.

§ 38. "*Machinery*" *defined.*

The term "machinery," as used in the Alabama act, has been defined by the Supreme Court of that State as follows: —

"The term 'machinery' embraces all the parts and instruments intended to be, and actually operated, from time to time, exclusively by force created and applied by mechanical apparatus or contrivance, though the initial force may be produced by the muscular strength of men or animals, or by water or steam, or other inanimate agency.[1] The carding, spinning, and weaving machines, together with the instrumentality by which the prime motive-power is created or applied, constitute the machinery of a cotton-mill. When cars, though used at times and at other times detached, are formed into a train, to which the propelling force is imparted by means of a locomotive, the entire train constitutes machinery connected with or used in the business. . . . A hammer is a tool or instrument ordinarily used by one man in the performance of manual labor. It may be made an essential part of machinery when intended to be, and is, operated by means thereof; but when disconnected from any other mechanical appliances, and operated singly by muscular strength directly applied, such tool or instrument is not 'machinery' in its most comprehensive signification, or in the meaning of the statute." [2]

It was accordingly held that the plaintiff could not recover for an injury caused by a defective hammer,

[1] Citing Seavey *v.* Central Ins. Co., 111 Mass. 540.

[2] Georgia Pacific Ry. *v.* Brooks, 84 Ala. 138, 140, 141.

which was disconnected from other mechanical appliances, and was operated singly by muscular strength directly applied.

§ 39. *Temporary Structures.*

The words "ways" and "works" in the statute apply only to ways and works of a permanent or quasi-permanent character. They do not apply to ways or works of a merely temporary character, although they are connected with, or used in the business of, the employer. Hence, it has been held under the Massachusetts act that a temporary staging, put up by masons employed by a contractor to erect a building on the land of a third person, is no part of the contractor's ways or works, and that he is not liable to an employee for an injury caused by a defect in the condition of the staging.[1]

So, in Lynch *v.* Allyn, 160 Mass. 248, in which the plaintiff was injured by the caving in of a bank of earth upon which he was working, on the land of a third person, the court says, through Mr. Justice Lathrop, on page 252: "The language of the section seems to us to point to ways and works of a permanent character, such as are connected with or used in the business of the employer." It was accordingly held that the liability of a bank of earth upon the land of a third person to fall when undermined by workmen, if not shored up, is not a "defect in the condition of the ways, works, or machinery connected with, or used in the business of, the employer," when the work on the bank is simply the levelling of it for grading the land of a person other than the defendant.

[1] Burns *v.* Washburn, 160 Mass. 457.

§ 40. *Works in Process of Construction or Destruction.*

It has been decided under the English act that the owner of works in process of construction is not liable to an employee for an injury caused by a defect in their condition, because until they are completed they cannot be said to be "connected with or used in the business of the employer," within the meaning of the statute.[1] In Conroy *v.* Clinton, 158 Mass. 318, 320, where an employee was killed by the caving in of a sewer trench in course of construction, the court remarked that the question whether the case fell within the terms "ways" or "works" in the Massachusetts act was "not free from difficulty." The decision, however, turned upon another point, and the court deemed it unnecessary to determine this question.

The case of a building contractor is, however, different from that of an owner in this respect. Works in process of construction or demolition by a builder are "connected with or used in the business" of such a person, and therefore he is liable to one of his employees who is injured by a defect in their condition. In Brannigan *v.* Robinson, [1892] 1 Q. B. 344, the defendant, a builder, was engaged to pull down an old house belonging to a third person. During the course of the work, he ordered the plaintiff, a laborer in his employment, to remove certain débris which lay on the ground near one of the standing walls. The defendant had neglected to have this wall shored up, and it fell upon the plaintiff and caused the injuries complained of.

[1] Howe *v.* Finch, 17 Q. B. D. 187.

It was held that the defendant was liable under the act. Lawrence, J., says on page 346: "The defendant was a builder, whose business it was to pull down walls, as well as to build them up. The walls he deals with must be just as much works connected with his business in the one case as in the other." Wright, J., says on page 347: "The question is whether, under those circumstances, the insecurity of the wall was not a defect in the condition of the works within the meaning of the act. If we were to hold that it was not, I think we would be putting an unduly narrow interpretation upon the word 'works,' and should be excluding from the operation of the act a large class of businesses which are not carried on upon any fixed site. I cannot see why premises which are in the possession of a person for the purposes of his business should not be regarded as the works of such person, so long as he is carrying on his business there. The case of Howe *v.* Finch, 17 Q. B. D. 187, is not in any way inconsistent with our judgment; for in that case the employer who was sued was not the builder, but the owner of the premises, and the wall, being still in an unfinished state and in the possession of the builder at the time of the accident, could not have been said to be connected with or used in the business of the employer."

An employer is, however, liable for the negligence of his superintendent, under another clause of the statute, while engaged in superintending the building or construction of his ways, works, or machinery.[1]

[1] Lynch *v.* Allyn, 160 Mass. 248; Hennessy *v.* Boston, 161 Mass. 502; *post*, §§ 57, 58.

§ 41. *Movable Staging owned by Defendant.*

In Prendible *v.* Connecticut River Manuf. Co., 160 Mass. 131, an employee was injured by the fall of a staging owned and used by the defendant. The staging was fifteen feet high, twenty feet long, and five feet wide, and was used in the yard of defendant's sawmill by the workmen in piling up the wood. It was moved from place to place as the work required, and was generally used in one place for four days or a week at a time. It was held that the staging, when erected, was a part of the "ways, works, or machinery" of the defendant, within the meaning of the statute.

§ 42. *Movable Stairs owned by Third Person.*

In Regan *v.* Donovan, 159 Mass. 1, the plaintiff was injured by the slipping of a flight of movable stairs. The defendants were contractors and builders, and were employed by one Roughan to do some work in his cellar. Several months before this the defendants had constructed the stairs for Roughan, and put them in the cellar. The plaintiff was ordered by one of the defendants to take a bar of iron down the stairs, and while in the act of doing so the stairs slipped and he was injured. It was held that the stairs were not a part of the ways connected with or used in the business of the defendant, within the terms of the Employers' Liability Act, and that the plaintiff could not recover. In the court's opinion, delivered by Mr. Justice Allen, it is said: —

"Nor can the action be supported under the Employers' Liability Act, St. 1887, ch. 270, on the ground that

there was a defect in the ways connected with, or used in the business of, the employer. It cannot be held that the defendants adopted the stairs as a way used in their business." Page 3.

§ 43. *Foreign Car used by Defendant for its own Benefit.*

It is settled that a foreign car, one not belonging to the defendant, constitutes a part of the defendant's "works or machinery" within the meaning of the statute, if it is used by the defendant for its own benefit. Such use may be in the form of a charge for freight for hauling over its road,[1] or it may be in the form of a hiring for use from another person or corporation.[2] In any such case, the fact that the defendant is not the owner of the car is immaterial. For the time being, the car is a part of the defendant's rolling-stock.

In Bowers *v.* Connecticut River Ry., 162 Mass. 312, 317, Mr. Justice Allen, in delivering the opinion of the court, says: —

"The first question under this count is, whether the cars were a part of the ways, works, and machinery used in the business of the defendant, within the meaning of the statute. They were loaded freight-cars which had come from other railroads, and which were to be hauled over a part of the defendant's railroad for the transportation of the freight contained therein, in the due course of the defendant's business. For the time being, they were used in the defendant's business as a part of its rolling-stock. The fact that the defend-

[1] Bowers *v.* Connecticut River Ry., 162 Mass. 312.

[2] Spaulding *v.* Flynt Granite Co., 159 Mass. 587.

ant did not own them is immaterial. The defendant was not bound to use them in its train if, on inspection, they were found to be unsafe. We think cars so used must be deemed to be a part of the defendant's works and machinery. Coffee *v.* New York, New Haven & Hartford Railroad, 155 Mass. 21; Gottlieb *v.* New York, Lake Erie & Western Railroad, 100 N. Y. 462; Fay *v.* Minneapolis & St. Louis Ry., 30 Minn. 231."

In Spaulding *v.* Flynt Granite Co., 159 Mass. 587, the plaintiff was injured by a defective brake in a car belonging to the Boston & Albany Railroad, which the defendant was using to transport its stone from the quarry to the railroad track. The chief defence was that, as the defendant had to take such cars as it could get from the railroad company, it should not be held to the rule as to furnishing proper instrumentalities, but only to the duty of inspection.[1] The court held, however, that the defendant was liable on the ground that it had failed to furnish proper appliances in the transaction of its business. In delivering the opinion, Holmes, J., says: "Whatever may be said of a car received by a railroad only for the purpose of being forwarded, and not used by it at all in the process (Coffee *v.* New York, New Haven & Hartford Railroad, 155 Mass. 21, 23), this car was used by the defendant as one of the instruments of its business. When that is the case, it does not matter whether the defendant owns the thing used or borrows it. The responsibility of the master to his servants is the same either way. . . . Probably, if the defendant had seen fit to furnish

[1] Mackin *v.* Boston & Albany Ry., 135 Mass. 201; Keith *v.* New Haven Co., 140 Mass. 175, 180.

its own cars, it could have done so. Certainly it was at liberty to carry the stone to the railroad by other means if it preferred. Even if the course of business adopted was the only one commercially practicable, there was nothing to hinder the defendant from seeing that the cars furnished it were put into proper condition before they were used." Pages 588, 589.

§ 44. *Same.*

In Alabama it has also been held that, if the defendant uses a foreign car, it is liable to an employee under the statute for a defect in its condition, to the same extent as if the car belonged to the defendant.[1]

In Gottlieb *v.* New York &c. Ry., 100 N. Y. 462, 469, Mr. Justice Earl, speaking for the court, says: "It [a railroad company] is not bound to take such cars if they are known to be defective and unsafe. Even if it is not bound to make tests to discover secret defects, and is not responsible for such defects, it is bound to inspect foreign cars just as it would inspect its own cars. It owes the duty of inspection as master, and is at least responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. When cars come to it which have defects visible or discoverable by ordinary inspection, it must either remedy such defects or refuse to take such cars; so much, at least, is due from it to its employees. The employees can no more be said to assume the risks of such defects in foreign cars than in cars belonging to the company. As to such defects, the duty of the company is the same as to all cars drawn over its road."

[1] Louisville &c. Ry. *v.* Davis, 91 Ala. 487; Alabama Great Southern Ry. *v.* Carroll, 97 Ala. 126.

It was accordingly held that bumpers only three inches wide on foreign freight-cars, which defendant was transporting loaded over its line, were defects which should have been discovered by ordinary inspection; and that the defendant railroad was liable to a brakeman in its employ who was crushed between such cars while attempting to couple them.[1]

In Baltimore &c. Ry. *v.* Mackey, 157 U. S. 72, a car inspector and repairer in the defendant's employ was crushed between two cars while repairing a draw-head. The injury was caused by a defective brake on a loaded foreign car, which allowed a train of freight-cars to go down grade and to bump into the cars that deceased was repairing. It was held that knowledge of the defective brake could not be imputed to the deceased, because he had had no opportunity to see it, and that the defendant railroad was liable. In delivering the court's opinion, Mr. Justice Harlan says, on page 91: —

"We are of opinion that sound sense and public policy concur in sustaining the principle that a railroad company is under a legal duty not to expose its employees to dangers arising from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted into its train."

§ 45. *Foreign Car not used by Defendant, but merely forwarded empty.*

Under the original Massachusetts act, it was held that an empty car belonging to another railroad company,

[1] See, also, Goodrich *v.* New York Central &c. Ry., 116 N. Y. 398; Reynolds *v.* Boston & Maine Ry., 64 Vt. 66; Chicago &c. Ry. *v.* Avery, 109 Ill. 314.

which was received and forwarded by the defendant company without using it in the process for its own benefit, was not part of the "ways, works, or machinery connected with or used in the business of the employer" within the meaning of the statute, and that accordingly the employer was not liable for an injury caused to an employee by reason of a defect in the brake-wheel of such a car.[1]

By the Massachusetts amendatory statute of 1893, ch. 359, the mere fact that a car is in the possession of a railroad company is declared to make it a part of its ways, works, or machinery. The act reads as follows: "A car in use by or in the possession of a railroad company shall be considered a part of the ways, works, or machinery of the company using or having the same in possession, within the meaning of this act, whether such car is owned by it or by some other company or person."

This statute seems to change the rule announced in Thyng *v.* Fitchburg Ry., 156 Mass. 13, under the original Massachusetts act, as well as the common-law rule declared in Mackin *v.* Boston & Albany Ry., 135 Mass. 201. These cases held that, when foreign cars were received by the defendant railroad company for the purpose of forwarding, the defendant was not held to the strict rule as to furnishing proper appliances for the work, but merely to the duty of inspection. Hence, if the defendant provided a sufficient number of competent inspectors, it was not liable for an injury caused by reason of a defect in the car's original construction or present condition, which was not discovered

[1] Coffee *v.* New York &c. Ry., 155 Mass. 21.

or remedied owing to the negligence of the inspector, or other person entrusted by the defendant with the duty of seeing that the cars were in proper condition.[1] The common employer was not liable at common law, because the inspector was a fellow-servant with the injured employee;[2] and the railroad company was not liable under the original statute, because a foreign car so used was not part of the "ways, works, or machinery connected with or used in the business of the employer." The act of 1893, ch. 359, therefore, gives an employee, who is injured by reason of a defect in a foreign car which is in possession of though not in use by the defendant, which defect the inspector negligently failed to discover or remedy, a right of action against his employer, if a railroad company, by expressly declaring that such a car "shall be considered a part of the ways, works, or machinery of the company using or having the same in possession." A car-inspector is obviously a person entrusted with the duty of seeing that the employer's ways, works, or machinery are in proper condition.[3]

§ 46. *Railroad Track of Connecting Road.*

The occasional use by the defendant railroad company of a connecting railroad's track, in delivering and taking cars in the course of business, does not make such track a part of the defendant's "ways" within the meaning of the Employers' Liability Act. The

[1] See, also, Kelly *v.* Abbot, 63 Wis. 307.

[2] Dewey *v.* Detroit &c. Ry., 97 Mich. 329; Smoot *v.* Mobile &c. Ry., 67 Ala. 13.

[3] Bowers *v.* Connecticut River Ry., 162 Mass. 312.

mere license to use such track does not give the defendant any control over it, nor impose any obligation upon the defendant to prevent defects in its condition.[1] Hence the defendant is not liable to its employee for an injury received by reason of a defect in that track.

Mr. Justice Morton, in delivering the court's opinion in Trask *v.* Old Colony Ry., 156 Mass. 298, at 303, says: —

"It may not be necessary, in order to render an employer liable for an injury occurring to an employee through a defect in the ways, works, or machinery, that they should belong to him, but it should at least appear that he has the control of them, and that they are used in his business, by his authority, express or implied.[2] Neither the employer nor any person in his service can be justly charged with negligence as to matters over which they have no control. The phrase, 'connected with or used in the business of the employer' (St. 1887, ch. 270, § 1, cl. 1), cannot be taken literally, but, when used in connection with ways, works, and machinery, must be understood to mean ways, works, and machinery connected with or used in the business of the employer by his authority and subject to his control."

§ 47. *Railroad Track of Shipper.*

In Engel *v.* New York &c. Ry., 160 Mass. 260, it was held by a majority of the court that a track in the yard of a shipper of freight, owned, maintained, and repaired by him, is no part of a railroad's "ways," though it is used by the railroad under a contract with the shipper for the delivery of freight in the yard.

[1] Trask *v.* Old Colony Ry., 156 Mass. 298.

[2] Citing Roberts & Wallace, Employers' Liability (3d ed.), 249, 250.

The case was decided upon the authority of Trask *v.* Old Colony Ry., 156 Mass. 298. Mr. Justice Knowlton, however, dissented, and distinguished the case from the Trask case upon the ground that, in that case, "the defendant had no control nor right of control, nor right to demand a safe condition, of the track of the other railroad. But in the present case the track is furnished to the defendant as a place on which to do its regular business for pay; and the defendant has the control of it in the sense that it has a right to insist on its being kept in a safe condition for the transaction of the business which it has agreed to do." Page 266.

Although the court repudiates the idea that ownership of the track by the defendant is a necessary condition of its liability (page 261), yet, upon its reasoning, it is difficult to see what control of a track short of ownership would render the track a part of its ways. After quoting the language of § 1, cl. 1, the court adds: "These words mean that the defect must be one which the employer has a right to remedy if he does discover it, and of a kind which it is possible to charge a servant with the duty of setting right." Page 261.

The court, therefore, held that the railroad company was not liable to an employee for an injury caused by reason of a defect in the condition of the track, but intimated that there was a remedy against the shipper for negligence.[1]

The dissenting opinion is supported by Stetler *v.* Chicago &c. Ry., 46 Wis. 497, and seems to be the better view of the subject.[2]

[1] Citing Finnegan *v.* Fall River Gas Co., 159 Mass. 311, and Osborne *v.* Morgan, 130 Mass. 102, 104.

[2] See, also, Commonwealth *v.* Boston & Lowell Ry., 126 Mass. 61.

CHAPTER IV.

NEGLIGENCE OF SUPERINTENDENT.

Section
48. Statutory provisions.
49. Enlargement of employee's common-law rights.
50. Common law respecting superintendent's negligence compared with Employers' Liability Act.
51. Same.
52. Who are "superintendents" within the meaning of the statute.
53. Who are not "superintendents" within the meaning of the statute.
54. Same. "Sole or principal" duty.
55. Same. Charge or control does not render one a superintendent.
56. Negligence of employer and superintendent.
57. What is negligence of superintendent. Alabama cases.
58. Same. Massachusetts cases.
59. Negligence must be an act of superintendence.
60. Superintendent doing work of common laborer.
61. Temporary absence of superintendent.
62. Instructions upon matters of detail.
63. Conflicting evidence as to whether person causing injury is a superintendent: jury to decide.
64. That superintendent is a careful workman is no defence.
65. Common employment under different employers.
66. General and special servants.
67. Injury to superior officer or other employee not under the superintendence of the negligent superintendent.
68. Employee liable to co-employee for negligence.

§ 48. *Statutory Provisions.*

The Massachusetts act of 1887 gives a right of action to an employee who is injured "by reason of the negligence of any person in the service of the employer, entrusted with and exercising superintendence, whose

sole or principal duty is that of superintendence;"[1] and the act of 1894, ch. 499, enlarges the employee's right of action by adding the words, "or, in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer."[2]

The fifth section of the Massachusetts act of 1887 contains a qualification of this right of action in these words: —

"An employee or his legal representatives shall not be entitled under this act to any right of compensation or remedy against his employer in any case where such employee knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or to some person superior to himself, in the service of the employer, who had entrusted to him some general superintendence."

The Alabama statute gives a right of action in § 2590 of the Code of 1886: —

"2. When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence.

"3. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, to whose orders or directions the servant or employee, at the time of the injury, was bound to conform, and did conform, if such injuries resulted from his having so conformed.

[1] St. 1887, ch. 270, § 1, cl. 2.

[2] St. 1894, ch. 499, § 1.

4. "When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer in that behalf."

The qualification upon this right reads as follows: —

"But the master or employer is not liable under this section if the servant or employee knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master or employer, unless he was aware that the master or employer, or such superior, already knew of such defect or negligence."[1]

§ 49. *Enlargement of Employee's Common-Law Rights.*

This is an important enlargement of the rights of employees and of the liabilities of employers. It gives a right of action in many cases for the negligence of a superintendent, who at common law was deemed to be merely a fellow-servant, for whose negligence the common employer was not liable. It restricts the defence of employers that the injury was caused by the negligence of a fellow-servant.[2]

In Griffiths *v.* Dudley, 9 Q. B. D. 357, 362, Field,

[1] Ala. Code, § 2590.

[2] Coffee *v.* New York &c. Ry., 155 Mass. 21, 22; O'Maley *v.* South Boston Gas Light Co., 158 Mass. 135, 136.

J., says: "The Employers' Liability Act was passed to obviate the injustice to workmen that employers should escape liability where persons having superintendence and control in the employment were guilty of negligence causing injury to the workmen. The employer was, before the passing of the act, clearly liable where he himself was guilty of negligence. It is also clear now that, for the negligence of a fellow-workman not coming within any of the classes of persons specified in the act, the employer is not liable. But before the passing of the act, Wilson *v.* Merry, L. R. 1 H. L. Sc. 326, had decided that, where the injury was caused through the negligence of a superior person in the employment, the workmen could recover no damages from their common employer. The object of the act was to get rid of the inference arising from the fact of common employment with respect to injuries caused by any persons belonging to the specified classes."

§ 50. *Common Law respecting Superintendent's Negligence compared with Employers' Liability Act.*

In Massachusetts the rule has always been strictly enforced in common-law actions that the common employer is not liable to an employee for injuries sustained through the negligence of a superintendent or superior workman. The fact that the latter has control over the plaintiff is deemed immaterial.[1] Even when the injury is caused by the negligent order of the defendant's

[1] Kalleck *v.* Deering, 161 Mass. 469; Moody *v.* Hamilton Manuf. Co., 159 Mass. 70; Zeigler *v.* Day, 123 Mass. 152; Floyd *v.* Sugden, 134 Mass. 563; Walker *v.* Boston & Maine Ry., 128 Mass. 8; McKinnon *v.* Norcross, 148 Mass. 533; Howard *v.* Hood, 155 Mass. 391.

superintendent either to a third person or to the injured employee, the defendant is not liable at common law.[1]

In Rogers *v.* Ludlow Manuf. Co., 144 Mass. 198, 203, Mr. Justice Field for the court says: "It is settled in this Commonwealth that all servants employed by the same master in a common service are fellow-servants, whatever may be their grade or rank."[2]

In Kenney *v.* Shaw, 133 Mass. 501, an action at common law, a workman was injured while engaged in blasting at a quarry, by reason of the negligence of the defendant's superintendent. It was held that "the injury was caused by one of the risks of the employment which the plaintiff assumed," and that he could not therefore recover of the common employer.

In the later case of Malcolm *v.* Fuller, 152 Mass. 160, under the Employers' Liability Act, upon similar facts, it was held that one object of the statute was to prevent the plaintiff from assuming the risk of a superintendent's negligence, and to make the common employer liable for such negligence, and that accordingly the plaintiff could recover.

In McGinty *v.* Athol Reservoir Co., 155 Mass. 183, an employee was injured by the fall of a derrick, caused by the pulling up of the post to which one of the guy ropes was fastened. The post was set by another work-

[1] Albro *v.* Agawam Canal Co., 6 Cush. 75; Flynn *v.* Salem, 134 Mass. 351; Benson *v.* Goodwin, 147 Mass. 237.

[2] This rule prevails also in the following jurisdictions: Brown *v.* Winona &c. Ry., 27 Minn. 162; Gonsoir *v.* Minneapolis &c. Ry., 36 Minn. 385; Mobile &c. Ry. *v.* Smith, 59 Ala. 245; Brodeur *v.* Valley Falls Co., 16 R. I. 448; Keystone Bridge Co. *v.* Newberry, 96 Pa. St. 246; Blake *v.* Maine Central Ry., 70 Me. 60; Pennsylvania Ry. *v.* Wachter, 60 Md. 395; Wilson *v.* Merry, 1 H. L. Sc. 326.

man, under the direction of the defendant's superintendent. In an action at common law, it was held that the superintendent was a fellow-servant with the plaintiff, for whose negligence the defendant was not liable. If the action had been under the Employers' Liability Act, the plaintiff could probably have recovered.

The Alabama rule at common law is thus stated by Mr. Justice Somerville for the court in Louisville &c. Ry. *v.* Allen, 78 Ala. 494, 502: "It was the settled law in this State, prior to the act of February 12, 1885, establishing by statute a contrary rule, that the employer is not liable in damages for any injury suffered by a fellow-servant by reason of the faults or negligence of another fellow-servant or co-employee in the same general business, unless such employer was chargeable with want of due care in having employed incompetent or unskilful servants in the particular business in which the injury was received." [1]

In Mobile &c. Ry. *v.* Smith, 59 Ala. 245, it was held that the general manager and superintendent of a railroad company was a fellow-servant with a locomotive fireman, within the meaning of this rule, and that therefore the common employer, the railroad company, was not liable to the fireman for an injury caused through the negligence of the general manager and superintendent.

§ 51. *Same.*

In England, until the passage of the Employers' Liability Act of 1880, a like rule prevailed at common law.[2]

[1] Citing Mobile &c. Ry. *v.* Smith, 59 Ala. 245, 248; and Mobile &c. Ry. *v.* Thomas, 42 Ala. 672.

[2] Wilson *v.* Merry, L. R. 1 H. L. Sc. 326; Feltham *v.* England, L. R. 2 Q. B. 33.

In Howells *v.* Landore Steel Co., L. R. 10 Q. B. 62, a coal-miner was killed through the negligence of the manager of the defendant's mine by an explosion of fire-damp. It was held that the defendant was not liable. Cockburn, C. J., says on page 64: "Since the case of Wilson *v.* Merry, L. R. 1 H. L. Sc. 326, in the House of Lords, it is not open to dispute that, in general, the master is not liable to a servant for the negligence of a fellow-servant, although he be the manager of the concern." Blackburn, J., says on pages 64, 65: "It is a rule of law that the master who employs a servant (not an agent) is responsible for the negligence of that servant in matters in which he is employed; but there is this exception, which has been established by a series of decisions, that with regard to a fellow-servant the master is held not so responsible, because this negligence is to be taken as one of the ordinary risks which the servant contemplates and undertakes when entering into his employment."

In Ohio, however, the rule generally recognized at common law has been repudiated in a long line of ably reasoned decisions, and the doctrine of "superior servant" established, by which a servant who is placed in control over another servant is not considered a fellow-servant, and the common employer is liable to the latter for an injury caused through the negligence of the former.[1]

[1] Little Miami Ry. *v.* Stevens, 20 Ohio, 415; Cleveland &c. Ry. *v.* Keary, 3 Ohio St. 201; Mad River &c. Ry. *v.* Barber, 5 Ohio St. 541; Whaalon *v.* Mad River &c. Ry., 8 Ohio St. 249; Pittsburgh &c. Ry. *v.* Devinney, 17 Ohio St. 197; Berea Stone Co. *v.* Kraft, 31 Ohio St. 287; Lake Shore &c. Ry. *v.* Lavalley, 36 Ohio St. 221. The Kentucky rule is very like the Ohio rule. Louisville &c. Ry. *v.* Collins, 2 Duvall (Ky.), 114.

Rogers *v.* Ludlow Manuf. Co., 144 Mass. 198, 201, 202, contains a concise statement of the views of different courts upon this question at common law by Mr. Justice Field, as follows: —

"As a corporation must act by natural persons, and as all large corporations carry on their business by means of servants of different grades, it is manifest that, if it is held that these are all fellow-servants, and that the corporation can delegate the whole duty of hiring and superintending its servants, and of providing its machinery and of keeping it in repair, to one or more principal servants, such as superintendents or managers, the corporation may escape all responsibility for injuries caused by defective machinery, except in the few cases where it can be shown that these principal servants were incompetent, or that the directors of the corporation, or its principal officers, knew that the subordinate servants were incompetent, or that the machinery was defective. To avoid this result, some courts have held that superintendents or managers are not fellow-servants with the men employed to work under them, or that servants employed in one department of the business are not fellow-servants with those employed in another. Other courts have held that they are all fellow-servants, but that the master cannot avoid his obligation to see to it that reasonable care shall be exercised in procuring suitable machinery, in keeping it in repair, and in hiring and retaining competent servants, by employing a servant to do these things for him, and that if he does employ a servant for this purpose, and the servant does not use due care, the master is responsible."

§ 52. *Who are "Superintendents" within the Meaning of the Statute.*

In Prendible *v.* Connecticut River Manuf. Co., 160 Mass. 131, the plaintiff was injured by the negligence of one Campbell. The evidence for the plaintiff was that Campbell was the foreman of a gang of workmen engaged in piling wood for the defendant in the yard of its sawmill; that he sometimes worked with his hands, but worked when he pleased and only at what he pleased; that even when he was at work he was also overseeing the men; that he placed the men at work; and that he hired workmen at different times. Two of the defendant's witnesses also testified that he had general authority over the gang of workmen. It was held that the jury was warranted in finding that Campbell's principal duty was that of superintendence, within the meaning of the statute, and that the common employer was liable for his negligence to the plaintiff.

At common law, Campbell would be merely a fellow-servant with the plaintiff, for whose negligence the defendant would not be liable.[1]

In Davis *v.* New York &c. Ry., 159 Mass. 532, a foreman of a gang of workmen engaged in track-repairing was held to be a person entrusted with and exercising superintendence, for whose negligence in failing to warn one of the workmen of the approach of a train the common employer was liable under the act. At common law, such a foreman was considered a fellow-workman, for whose negligence the common employer was not liable.[2]

[1] McGuerty *v.* Hale, 161 Mass. 51, 54; Zeigler *v.* Day, 123 Mass. 152.
[2] Clifford *v.* Old Colony Ry., 141 Mass. 564.

A foreman in charge of a gang of seven men employed in pile-driving, who has power to employ and dismiss men, and who does not work with his hands, but directs the men, is a superintendent within the meaning of the Massachusetts act, although there is a general superintendent over him in the defendant's service.[1]

In Mahoney *v.* New York &c. Ry., 160 Mass. 573, it was held that the jury would be justified in finding that the principal duty of a person who was section foreman of a gang of five men in the employ of a railroad corporation, and under whose directions the plaintiff was working at the time of the injury, was that of superintendence within the Massachusetts act of 1887, ch. 270.

§ 53. *Who are not "Superintendents" within the Meaning of the Statute.*

The statute, however, does not wholly abolish the defence that the injury was caused by the negligence of a fellow-servant, but merely restricts it. There are still many cases in which this defence is available to the common employer.

In O'Connor *v.* Neal, 153 Mass. 281, 284, Mr. Justice Morton, for the court, says: —

"The statute [Employers' Liability Act] does not apply to a mere laborer working under or with others, even though it may be a part of his duty at some particular moment in the progress of the work to look after and attend to certain instrumentalities."

In O'Connor *v.* Neal, *ubi supra*, a mason was injured through the negligence of an ordinary workman in

[1] McPhee *v.* Scully, 163 Mass. 216.

placing one end of a staging unevenly on the floor, so that it tipped when the plaintiff stepped upon it, and caused him to fall. It was held that the workman was a fellow-servant of the plaintiff, for whose negligence their common employer was not liable to the plaintiff, either at common law or under the statute.

In Alabama the rule has been thus stated by Mr. Chief Justice Stone: "To be actionable under that part of the statute which controls this case (Code, § 2590, subd. 2), the injury must be caused by the negligence of some person in the service or employment of the master or employer, 'who has superintendence intrusted to him, while in the exercise of such superintendence.' To hold the master or employer liable under this provision, the negligence must be that of some agent or employee who is in the exercise of superintendence, and to whose negligence in such exercise the disaster is traced. To hold otherwise would be to fasten liability on the principal to the employee for that which is at most the negligence of a fellow-servant having no greater power or authority than the servant who complains of the injury. This the statute does not authorize."[1]

In O'Brien *v.* Rideout, 161 Mass. 170, a man who had worked upon a circular saw six or seven times, and had been hired as a common laborer, was set to work upon the saw by the defendant's foreman. The plaintiff testified that this foreman "kept himself at work pretty much all the time in getting out lumber, or piling it up, or arranging it, and in operating saws." It was held that such evidence would not justify a finding that the

[1] Sheffield *v.* Harris, 101 Ala. 564, 569, 570; 14 So. Rep. 357, 358.

foreman was a person whose sole or principal duty was that of superintendence within the terms of the Massachusetts statute; and that the foreman was merely a fellow-servant with the plaintiff, for whose negligence the defendant was not liable, either at common law or under the Employers' Liability Act.

§ 54. *Same.* "*Sole or Principal*" *Duty.*

Evidence that an employee exercised some acts of superintendence within a narrow scope of employment will not warrant a finding that his "sole or principal" duty was that of superintendence, as required by the Massachusetts statute of 1887.

In Dowd *v.* Boston & Albany Ry., 162 Mass. 185, the plaintiff was injured by the negligence of one McDonald. It appeared that McDonald, in the absence of the superintendent and foreman, gave directions to the plaintiff and to other workmen, but that he worked with his hands and drew the same wages as the plaintiff and the ordinary workmen, and that he received orders from the foreman and from the general superintendent. It was held that a verdict was properly ordered for the defendant, as the evidence was not sufficient to justify a finding that McDonald's "sole or principal" duty was that of superintendence.[1]

In O'Neil *v.* O'Leary, 164 Mass. 387, the question was whether "the sole or principal duty" of one McDonald was that of superintendence. It appeared that

[1] See, also, Shepard *v.* Boston & Maine Ry., 158 Mass. 174.

The injury in Dowd *v.* Boston & Albany Ry. (*supra*) probably occurred before the passage of St. 1894, ch. 499, § 1, imposing a liability for the negligence of an acting superintendent.

he was entrusted with, and was exercising the duty of, superintending certain blasting operations, by one of which the plaintiff was injured. But the undisputed evidence showed that McDonald also worked with his own hands in attending to the fire under the steam-boiler, in sharpening all the tools used by the workmen, in charging the drill-holes and in clearing them out, and in other acts of manual labor, which altogether occupied most of his time. It was held by a majority of the court that this evidence would not warrant a finding that McDonald's "sole or principal" duty was that of superintendence, and that a verdict should have been ordered for the defendant. In the opinion, by Mr. Justice Lathrop, it is said on pages 390, 391: "In a sense it is undoubtedly true that superintendence is more important than manual labor, and so, if superintendence is entrusted to a man who also works with his hands, it may be said that his principal duty is that of superintendence. But if the statute had intended that every person exercising superintendence should not be considered a fellow-servant with a person injured, there would have been no need of the words 'whose sole or principal duty is that of superintendence.' These words must have a reasonable interpretation given to them; and a majority of the court is of opinion that it cannot be said of a person who works at manual labor, to the extent shown in this case, that his principal duty is that of superintendence."

A like rule prevails under the English act. In Kellard *v.* Rooke, 21 Q. B. D. 367, the plaintiff was injured through the negligence of one Bodfield in failing to notify him that a bale of wool was about to be dropped

down into the hold of a vessel where the plaintiff was at work. Bodfield was the foreman of a gang of laborers among whom the plaintiff worked. The defendant generally superintended such work in person, but, as he was temporarily absent, Bodfield, who worked with his hands on deck, was authorized to warn the men below when the bales were ready to drop by calling out, "Stand from under." It was held that Bodfield was not a superintendent within the meaning of the act, and that a nonsuit was properly ordered.

§ 55. *Same. Charge or Control does not render one a Superintendent.*

The fact that the negligent employee has the charge or control of the ways, works, machinery, or plant does not make him a superintendent within the meaning of these clauses.[1] In this respect the employer's liability differs materially from that of a railroad employer.[2]

In Shaffers *v.* General Steam Navigation Co., 10 Q. B. D. 356, the plaintiff, while working in the hold of a vessel, was hit by a sack of corn, which fell down the hatchway through the negligence of one Jones. The bags were lowered into the hold of the ship by means of a crane, and it was Jones's duty to guide the beam of the crane by a guy-rope, and to give directions to the man working the crane when to lower and when

[1] Shaffers *v.* General Steam Navigation Co., 10 Q. B. D. 356; Kellard *v.* Rooke, 19 Q. B. D. 585; s. c., 21 Q. B. D. 367; Rosebaek *v.* Ætna Mills, 158 Mass. 379; Dantzler *v.* De Bardeleben Coal Co., 101 Ala. 309; s. c., 14 So. Rep. 10.

[2] See ch. v., §§ **69, 75–81**, on the liability of railroad companies to their employees for the negligence of persons in the charge or control of certain railroad appliances.

to hoist. At the time of the accident, Jones failed to check the swing of the crane's beam, in consequence of which the sacks struck the combing of the hatchway, were thrown out of the sling, and fell down the hatchway and broke the plaintiff's leg. It was contended that, as Jones had the charge of the crane, the jury would be justified in finding that he was a superintendent within the meaning of the act, but the court held the contrary and nonsuited the plaintiff.

In Roseback *v.* Ætna Mills, 158 Mass. 379, a loom-fixer was injured by the starting up of a loom by the weaver. He had been notified to fix a slight defect in the loom, and while in the act of fixing it the weaver started the loom. The weaver had operating charge and control of the loom, and when it got out of repair it was her duty to notify the loom-fixer to put it in order. The plaintiff contended that the weaver was a person "entrusted with and exercising superintendence," etc., within the Employers' Liability Act,[1] because she had the charge and control of the loom. But the court held that she was no more than the plaintiff's fellow-servant, and that he could not recover of their common employer under the statute.

In Dantzler *v.* De Bardeleben Coal Co., 101 Ala. 309; 14 So. Rep. 10, one McKay was killed while inside of a blowing cylinder or tub, repairing it, through the negligence of one Gould in failing to keep the blowing-engine disconnected with the steam supply.

[1] This clause of the act is not so broad as that relating to railroads, which gives a right of action for the negligence of any person who has "the *charge or control* of any signal, switch, locomotive engine, or train upon a railroad."

Gould was an engineer, and had charge of five blowing engines, including the one in which McKay was killed. He had the aid of a helper, who worked under him, but he operated the machines with his own hands, as directed by persons superior to him in the service. In an action under the statute by McKay's personal representative, it was held that Gould was not a superintendent within the meaning of the act, but was merely a fellow-servant with McKay, for whose negligence the common employer was not liable.

Other cases under the statute, in which it was held that the plaintiff could not recover because his injury was caused by the negligence of his fellow-servant, are cited in the note.[1]

§ 56. *Negligence of Employer and Superintendent.*

In an action to recover damages for the negligence of a superintendent under the statute, the employer cannot escape liability by showing that his own act contributed to the injury.

In Connolly *v.* City of Waltham, 156 Mass. 368, a laborer employed upon the defendant's water-works was injured by the caving in of a trench while he was at work upon it. The defendant's superintendent was negligent in failing to sheet and brace the trench, and in permitting earth to be piled upon the bank; but the defendant contended that, inasmuch as it had not furnished its superintendent with materials for bracing the trench, he was not negligent in failing to brace it, and that therefore it was not liable on a count alleging negli-

[1] Ashley *v.* Hart, 147 Mass. 573; Thyng *v.* Fitchburg Ry., 156 Mass. 13; Shepard *v.* Boston & Maine Ry., 158 Mass. 174.

gence of the superintendent. But the court held that this was too narrow a view of the case; that, if the superintendent "knew, or had reason to know, that there was danger of the caving of the trench, and had no materials for bracing it, and no power to procure them, due care required him to stop the work until suitable materials were furnished; and it was personal negligence in his work of superintendence to allow the digging to go on before the necessary materials were procured. For such negligence of a superintendent the principal is answerable, and cannot escape liability by showing that it was by his own act, and not by the fault of the superintendent, that suitable materials were wanting." Per Barker, J., page 370.

§ 57. *What is Negligence of Superintendent. Alabama Cases.*

A superintendent's negligence may consist in knowingly allowing the employer's ways, works, machinery, or plant to be and remain in a defective condition. Thus, in Seaboard Manuf. Co. *v.* Woodson, 94 Ala. 143, a locomotive fireman was injured by the starting of the engine while he was underneath it oiling and cleaning it. The defect which caused the engine to start was that the throttle-valve leaked, which allowed the steam to pass through into the cylinders, and thus caused the engine to move off without notice to the plaintiff. One count alleged that the plaintiff was injured by reason of the negligence of the defendant's foreman, who was entrusted by the defendant with the exercise of superintendence over the plaintiff, said railroad, its engine, and cars; that the negligence of said foreman

consisted in knowingly allowing said engine to be and remain in a defective condition; and that the defect was a leaky throttle-valve, etc. On demurrer it was held that this count stated a good cause of action under the second subdivision of section 2590 of the Alabama Code. Mr. Justice Walker, for the court, says on page 148: "Here there is an explicit averment of the negligence of a person intrusted with a superintendence by the employer; it is shown that he was guilty of such negligence whilst in the exercise of such superintendence, and that the injury was caused by reason of the omission of duty which was described as negligent. These averments brought the charge within the terms of the statute, and were sufficiently explicit."

It seems that knowledge of the defect by the defendant's superintendent is not essential to render the employer liable. In an action under the first clause of section 2590 for an injury caused by a defective brake on a railroad car, it was held that the plaintiff need not allege or prove knowledge by the defendant of the defect in the brake.[1]

The act of a yard-master of a railroad company in placing a car on a side track so near to a main track as to knock a brakeman off a train on the latter track, while he is in the ordinary discharge of his duty, is actionable negligence for which the common employer is liable under the superintendence clause of the Alabama statute.[2]

The act and omission of the superintendent in charge of the construction of a railroad bridge, in placing

[1] Louisville &c. Ry. *v.* Coulton, 86 Ala. 129.

[2] Kansas City &c. Ry. *v.* Burton, 97 Ala. 240.

certain heavy timbers upright and allowing them to stand upright unsecured, are negligence for which the employer is liable to an employee who is injured by the fall of the timbers.[1]

§ 58. *Same. Massachusetts Cases.*

A superintendent's negligence may also consist in the failure to take proper precautions to protect employees who are engaged in the process of constructing the defendant's ways, works, machinery, or plant.

In Hennessy *v.* Boston, 161 Mass. 502, the plaintiff, while digging a sewer trench in the streets of Boston, was injured by the caving in of its sides. The trench was about thirty or forty feet long, twelve or thirteen feet deep, three feet wide at the top, and about one and a half feet wide at the bottom. There was no bracing, except two blocks of earth about four feet wide and about twenty-five feet apart. There was a foreman in charge of the work, whose sole or principal duty was that of superintendence. In an action under the statute, it was held that there was evidence from which the jury might have found that the foreman was guilty of negligence, and that the presiding judge erred in ordering a verdict for the defendant.[2]

In O'Keefe *v.* Brownell, 156 Mass. 131, a workman engaged in labor upon a school-house in process of erection was killed by a heavy truck falling upon his head through an opening in the floor above him. The

[1] Collier *v.* Coggins, 103 Ala. 000; 15 So. Rep. 578.

[2] If this action had not been under the statute, but at common law, the plaintiff could not have recovered of the defendant, because the foreman was merely a fellow-servant of the plaintiff. Zeigler *v.* Day, 123 Mass. 152.

truck was a movable tool designed for rolling loads from one part of the same floor to another. When not in use, it could be easily blocked by nails or bits of wood suitable for cleats; but when in use in this way no cleats, of course, could be used without destroying its usefulness. While stationary and in use by a fellow-workman in landing heavy planks, the truck fell through an opening in the floor and injured the plaintiff's intestate.

In an action under the statute the plaintiff contended that the omission to use some appliance for blocking the truck was negligence of a superintendent, or was a want of superintendence on the employer's part, and also that the absence of blocking appliances constituted a defect in the condition of the defendant's machinery. But the court held that the employer was not liable upon either ground; that the omission to use a blocking appliance at the time of the injury was the negligence of a fellow-servant, and not of a superintendent, or of a want of superintendence; and that the absence of such appliance as a permanent attachment to the truck was not a defect in the tools or machine.

The failure of a superintendent to discover that a ledge stone had been left for two or three days on a staging in such a position as to be liable to fall from a slight jar, when its position could only be seen from above the staging, is not negligence for which the common employer is liable to a workman injured by the fall of the stone.[1] Nor is the common employer liable under the statute for the failure of his superintendent to warn

[1] Carroll *v.* Willcutt, 163 Mass. 221.

the plaintiff of a danger or defect with which he (the plaintiff) was previously acquainted.[1]

§ 59. *Negligence must be an Act of Superintendence.* In order to recover damages of an employer for the negligence of his superintendent, it must appear that the negligence occurred in the exercise of superintendence: it is not sufficient to show that the negligence occurred merely during the period of superintendence. The act complained of must be an act of superintendence; otherwise an action cannot be maintained under the statute. A few illustrations on both sides of the line will render the distinction clear.

In McCauley *v.* Norcross, 155 Mass. 584, a workman engaged upon the second floor of a building in process of erection was injured by the fall of an iron beam upon him through an opening in the floor above. The beam, with several others, had been placed on the third floor, about three and a half feet from the opening, two or three days prior to the injury, and had been allowed to remain there. The defendant's superintendent, while walking about this floor, and in order to pass between the beams and a pile of planks, pushed the beam with his foot, whereupon it swung around upon the other beams and fell through the hole in the floor upon the plaintiff. In an action under the statute, it was held that the fact that it was the superintendent himself who pushed the beam was of no importance, because that was not an act of superintendence; but that the jury was warranted in finding a lack of proper superintendence, for which the defendant was liable, from the

[1] Perry *v.* Old Colony Ry., 164 Mass. 296.

circumstance that the beams were allowed to remain in such a position for two or three days, — a position in which a slight inadvertent push of the foot by a passer-by would send the beam through the opening.

The act of a foreman of a gang of workmen engaged in pile-driving, in giving the order to "hoist again" when the gypsy fall was foul of the chocking-block, whereby the hammer was released and the plaintiff injured, is an act of superintendence, for which the employer is liable under the Massachusetts act.[1] So, also, allowing the gypsy fall to be handled by a workman obviously intoxicated at the time, who allowed the fall to get foul of the block, is an act of superintendence within the meaning of that statute.[2]

In Fitzgerald *v.* Boston & Albany Ry., 156 Mass. 293, the plaintiff was injured while stowing away hay in the defendant's hay-shed by the fall of a bale of hay upon him. It did not appear what caused the hay to fall, nor that the defendant's superintendent knew, or ought to have known, that the hay was liable to fall. In an action under the statute, it was held that there was no evidence to justify a finding that the superintendent was negligent, and that a verdict was properly ordered for the defendant. The reason assigned was that the negligence complained of did not occur in the exercise of superintendence, even if it occurred during the superintendence.

Where the article causing the injury is of such a nature that the law does not require the employer to inspect it before allowing it to be used by his em-

[1] McPhee *v.* Scully, 163 Mass. 216.

[2] McPhee *v.* Scully, 163 Mass. 216.

ployees, the failure of the defendant's superintendent to discover an apparent defect therein, before giving it to the plaintiff for use, does not render the defendant liable under the statute, at least where it is outside the superintendent's field of superintendence. Thus, in Shea *v.* Wellington, 163 Mass. 364, the plaintiff, while blasting in a quarry, was injured by an explosion of dynamite in a drill-hole which he was loading, caused, as he alleged, through the negligence of the defendant's superintendent, Watson, in furnishing him with a defective exploder. The plaintiff testified that, on the day of the accident, Watson handed him seven exploders to be used in loading seven holes, and that one of them he picked at with his finger-nail and said, "I guess that is all right;" that the plaintiff saw a seam in the copper covering of the exploder, through which he noticed a white substance. There was evidence from other witnesses to the effect that, if there was a seam in the exploder through which the fulminate of mercury could be seen, it would adequately account for the accident. The defendant bought his exploders ready-made from a reputable manufacturer. It was no part of Watson's duty to inspect exploders, nor had he ever done so with the defendant's knowledge and consent. It was held that the defendant was not bound to inspect the exploders before using them, and that, if Watson was negligent in not discovering the defect, his negligence was that of an ordinary employee, and not that of a superintendent, and that the defendant was not liable.

§ 60. *Superintendent doing Work of Common Laborer.*

Although the negligence causing the injury is that of a person "entrusted with and exercising superintendence" within the terms of the Massachusetts statute, still if, at the time of and in doing the act complained of, he is merely doing the work of a common laborer, the employer is not liable. "The law recognizes that an employee may have two duties: that he may be a superintendent for some purposes, and also an ordinary workman, and that if negligent in the latter capacity, the employer is not answerable."[1]

For the above reasons it was held that an employer was not liable for the negligence of his engineer, who raised a fall, which swung into the hold of a vessel and to which a hook was attached, when he was ordered to lower it, whereby the hook was pulled out of a workman's hands and struck the plaintiff. The engineer employed the men, showed them how to do the work, and discharged them. Upon these facts the court held that it might be competent for the jury to find that the engineer was to some extent a superintendent; but that, as he was acting merely as an ordinary workman at the time of his negligence, the plaintiff could not recover.[2]

On the other hand, the employer may be liable under the act for the negligent order of his superintendent,

[1] Per Barker, J., in Cashman *v.* Chase, 156 Mass. 342, 344. See, also, Shaffers *v.* General Steam Nav. Co., 10 Q. B. D. 356; Kellard *v.* Rooke, 19 Q. B. D. 585, and 21 Q. B. D. 367.

[2] Cashman *v.* Chase, 156 Mass. 342.

although at the time of the plaintiff's injury the superintendent is performing manual labor. In Osborne *v.* Jackson, 11 Q. B. D. 619, the plaintiff, a bricklayer in defendant's employ, was working near a shoring while a scaffold was being taken down by others. The defendant's foreman, one Thomas, while holding one end of a plank, called to one Collier to take hold of the other end. Collier took hold of the plank, but was so far off that he could not hold it alone, and as soon as Thomas let go his end the plank slipped and knocked down the shoring, which fell upon the plaintiff and caused the injury complained of. It was held that the defendant was liable. Denman, J., says on page 620: "The decision in Shaffers *v.* General Steam Navigation Co., 10 Q. B. D. 356, was decided on grounds which do not apply here. The negligent person there had two duties, and was not negligent in his duty of superintendence so as to cause the accident. In the present case the foreman was generally superintending the work on which the plaintiff and Collier were employed. The foreman called to Collier, who was under his orders, to take the plank when it was impossible to do so safely; that was superintendence, and the judge might find, and has found, that it was negligence within the meaning of sub-section 2. I think it was so, although Thomas was at the time supplying as a volunteer the place of another workman." Hawkins, J., says on page 621: "If Thomas had directed another to do what he did himself, he would surely have been negligent in the exercise of superintendence."

§ 61. *Temporary Absence of Superintendent.*

It is well settled that, when the ground of liability is the negligence of a superintendent, the negligence must occur not only during the period of superintendence, but also in the exercise of it.[1] The negligence, however, may consist in his temporary absence from his post of duty, and this is considered to be negligence in the exercise of superintendence within the rule of liability. In Lynch *v.* Allyn, 160 Mass. 248, the plaintiff was injured by the falling of a bank of earth upon him while he was undermining it, and during the temporary absence of the superintendent, whose duty it was to look after the bank and the men. The bank was not shored up in any way, and when the superintendent left the spot he failed to station any one there to give warning of the danger. It was held that it could not be ruled as matter of law that the superintendent was not negligent, and that it was a question for the jury to decide.

§ 62. *Instructions upon Matters of Detail.*

In the prosecution of work there are many matters of detail which devolve upon the common laborer and not upon the superintendent. In such matters the failure of the superintendent to give special instructions is not such negligence on his part as will render the employer liable to an employee who is injured through the negligence of a fellow-servant.

In Burns *v.* Washburn, 160 Mass. 457, a mason's

[1] Fitzgerald *v.* Boston & Albany Ry., 156 Mass. 293; Cashman *v.* Chase, 156 Mass. 342; *ante*, § 59.

tender was injured by a staging falling upon him. The immediate cause of its fall was the negligence of one of the masons in driving but one nail in the end of a board instead of several nails. The defendant's superintendent told the masons to build a certain piece of wall, leaving them to construct their stagings without instructions. The plaintiff claimed that this failure to instruct the masons how to build their stagings, and his absence during their building, was negligence of the superintendent within the meaning of the act, for which the employer was liable. But the court held that the plaintiff could not recover. In delivering the opinion of the court, Mr. Justice Lathrop says on page 458: —

"The mere fact that the superintendent gave no instructions as to the staging cannot be said to be evidence of negligence on his part. No instructions were needed. The masons were accustomed to build their own stagings, and probably knew as much about the proper way of constructing them as the superintendent. Nor is the fact that the superintendent was not present while the staging was building of itself evidence of negligence on his part. A general superintendent of a building cannot be expected to be present as every detail of the work is done." [1]

§ 63. *Conflicting Evidence as to whether Person causing Injury is a Superintendent: Jury to decide.*

If the plaintiff's evidence tends to show that the person whose negligence caused the plaintiff's injury is a superintendent within the meaning of the statute, and the evidence for the defendant tends to show that such

[1] Citing Fitzgerald *v.* Boston & Albany Ry., 156 Mass. 293.

person is merely a fellow-servant, the question should be submitted to the jury for determination.[1] But where all the evidence in favor of the plaintiff fails to show that such person is a superintendent within the meaning of the statute, the presiding judge should so instruct the jury, and, if the plaintiff's case is founded solely on that ground, a verdict should be ordered for the defendant.[2]

The question, whether a superior servant is a vice-principal or merely a fellow-servant, is a question of law for the court to decide, when there is no conflict of evidence, and it is therefore erroneous for the judge to submit that question to the jury.[3]

But when the evidence upon this point is conflicting, the question should be left to the jury.[4]

§ 64. *That Superintendent is a Careful Workman is no Defence.*

In an action under the statute for the negligence of a superintendent, it is no defence to show that he was a careful workman,[5] or that the defendant had exercised due care in selecting him. To hold otherwise would be a palpable evasion of the statute, and would render this clause of the act nugatory.

[1] Malcolm *v.* Fuller, 152 Mass. 160.

[2] O'Neil *v.* O'Leary, 164 Mass. 387.

[3] Johnson *v.* Boston Tow-Boat Co., 135 Mass. 209; McGinty *v.* Athol Reservoir Co., 155 Mass. 183, 187.

[4] Patnode *v.* Warren Cotton Mills, 157 Mass. 283, 287.

[5] Malcolm *v.* Fuller, 152 Mass. 160.

§ 65. *Common Employment under Different Employers.*

The mere fact that employees are engaged in labor upon the same piece of work does not make them fellow-servants within the rule which exempts the employer from liability for negligence of his servants. To come within this rule, the employees must have the same employer. If they are servants of different masters, they are not fellow-servants within this rule, and the employee of one master can recover damages of the other master for an injury caused by the negligence of the latter's servants.[1]

In such case the injured employee cannot be said to take upon himself the risk of negligence coming from the servant of another master. Nor has he any adequate means of guarding against such negligence. In the case of a common employer, on the other hand, "each [employee] is an observer of the conduct of the others; can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions, and employ such agents, as the safety of the whole party may require."[2]

§ 66. *General and Special Servants.*

The general servant of one master may become the special servant of another master for the time being.

[1] Morgan *v.* Smith, 159 Mass. 570; Burrill *v.* Eddy, 160 Mass. 198; Johnson *v.* Lindsay, [1891] A. C. 371, reversing Johnson *v.* Lindsay, 23 Q. B. D. 508.

[2] Per Shaw, C. J., in Farwell *v.* Boston & Worcester Ry., 4 Met. 49. 59.

In such case the special servant becomes a fellow-servant with the general servants of the latter master, so as to exempt him from liability to his special servant for the negligence of his general servants. Thus, if A lends his servant to B for a particular piece of work, and the servant is injured by the negligence of B's general servants, he cannot recover of B because they are considered fellow-servants.[1]

But in order to relieve the new master in such case, it must appear that the servant knew that he had ceased to be under the control of the master employing him, and had passed under the control of the new master. In Morgan *v.* Smith, 159 Mass. 570, 571, the following extract from the opinion of Lord Watson in Johnson *v.* Lindsay, [1891] A. C. 371, is quoted with approval as correctly stating the rule and its limitations: —

"I can well conceive that the general servant of A might, by working towards a common end along with the servants of B, and submitting himself to the control and orders of B, become *pro hac vice* B's servant, in such sense as not only to disable him from recovering from B for injuries sustained through the fault of B's proper servants, but to exclude the liability of A for injury occasioned, by his fault, to B's own workmen. In order to produce that result, the circumstances must, in my opinion, be such as to show conclusively that the servant submitted himself to the control of another person than his proper master, and either expressly or impliedly consented to accept that other person as his master for the purposes of the common employment."[2]

[1] Hasty *v.* Sears, 157 Mass. 123.

[2] See, also, Philadelphia &c. Ry. *v.* Bitzer, 58 Md. 372; Svenson *v.*

It follows from these views that, if the general employee of one person is injured through the negligence of the defendant's superintendent, or of a person in his employ to whose orders the plaintiff was bound to conform, and did conform, while in the temporary employ of the defendant, he may recover under the Employers' Liability Act in an action against his temporary employer.[1]

§ 67. *Injury to Superior Officer or other Employee not under the Superintendence of the Negligent Superintendent.*

The fact that the injured employee is not subject to the orders or under the superintendence of the superintendent whose negligence causes the injury does not prevent a recovery under the Employers' Liability Act against the common employer.

In Kansas City &c. Ry. *v.* Burton, 97 Ala. 240, a brakeman was injured through the negligence of a yardmaster in placing a car too near a track, by which the plaintiff, who was passing on a car upon another track, was knocked off. The defendant contended that, as the plaintiff was not under the superintendence of the yardmaster, the statute imposed no liability. But the court held the contrary, saying through Mr. Justice McClellan on page 246: "Under sub-section 2, it is manifest, we think, the liability of the defendant is in no sense dependent upon the relations existing in the service between the negligent and the injured person. If the

Atlantic Mail Co., 57 N. Y. 108; Phillips *v.* Chicago &c. Ry., 64 Wis. 475; Sawyer *v.* Rutland &c. Ry., 27 Vt. 370; Cameron *v.* Nystrom, [1893] A. C. 308.

[1] Wild *v.* Waygood, [1892] 1 Q. B. 783.

former has superintendence intrusted to him, and is negligent in the exercise of it to the injury of any 'servant or employee in the service or business of the master,' whatever be the relation *inter se* of the servants, the master is made liable therefor by the very terms of the statute. If a yard-master, charged with the duty of keeping the tracks clear, should negligently obstruct a track, and in consequence the president of the company should be injured in the service of the employer, the corporation, it cannot be doubted that the latter would have to respond in damages."

§ 68. *Employee liable to Co-employee for Negligence.*

The rule, that an employee cannot recover of the common employer for the negligence of a co-employee, does not bar the injured person of all remedy. He has the right at common law to sue his co-employee, and may recover a judgment for damages to the full extent of his injury.[1] The difficulty occurs in obtaining satisfaction of the judgment, as most employees are unable to pay large sums.

The Colorado Employers' Liability Act expressly declares upon this point that —

"If the injury sustained by the employee is clearly the result of the negligence, carelessness, or misconduct of a co-employee, the co-employee shall be equally liable under the provisions of this act with the employer, and may be made a party defendant in all actions brought to recover damages for such injury," etc.[2]

[1] Osborne *v.* Morgan, 130 Mass. 102 (overruling Albro *v.* Jacquith, 4 Gray, 99); Hinds *v.* Overacker, 66 Ind. 547; Griffiths *v.* Wolfram, 22 Minn. 185; Swainson *v.* Northeastern Ry., 3 Ex. Div. 341; Winterbottom *v.* Wright, 10 M. & W. 109; Milligan *v.* Wedge, 12 Ad. & El. 737.

[2] St. 1893, ch. 77, § 5.

CHAPTER V.

LIABILITY PECULIAR TO RAILROAD EMPLOYERS.

Section
69. Scope of chapter, and statutory provisions.
70. "Train" defined.
71. "Locomotive engine.'
72. "Car."
73. "Upon a railroad."
74. Statutory defects in freight-cars, grab-irons and draw-bars. Blocking of frogs, switches, and guard-rails.
75. "Charge or control" for temporary purpose.
76. "Charge or control" of train.
77. Brakeman or other employee may have charge or control of train.
78. Different views at common law concerning person in charge or control of train.
79. Who may have the charge or control of locomotive engine.
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81. Negligence of person in charge or control of signal, switch, engine, car, etc.
82. Railroads operated by receivers.
83. Same. Prior leave of appointing court to sue.
84. Constitutionality. Discrimination against railroads.
85. Same.

§ 69. *Scope of Chapter, and Statutory Provisions.*

This chapter does not include all cases of liability of railroad companies under the acts, but merely those cases which are exceptional and peculiar to railroads. Other cases are discussed under their appropriate titles in other parts of the book.[1]

As applied to railroad companies, the defence of fellow-service has been much further restricted by the Employers' Liability Acts than as applied to other employers. As we have seen, other employers are

[1] See, particularly, §§ 168, 169.

made liable for the negligence of their superintendents.[1] Railroad companies are not only made liable by the Massachusetts act for a superintendent's negligence,[2] but also for "the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine, or train upon a railroad."[3]

The English and Colorado statutes are to the same effect, though the English act uses the word "points" instead of "switch."[4]

The Alabama act goes still further in this direction, and makes a railroad company liable for "the negligence of any person in the service or employment of the master or employer who has the charge or control of any signal, points, locomotive engine, switch, car, or train upon a railway, or of any part of the track of a railway."[5]

§ 70. "*Train*" *defined.*

The Massachusetts act gives a right of action to an employee of a railroad company who is injured "by reason of the negligence of any person in the service of the employer who has charge or control of any . . . train upon a railroad."

To constitute a "train" within the meaning of the statute, it is not necessary that the cars should be attached to a locomotive at the moment of the injury,

[1] *Ante*, §§ 48, 49.

[2] Davis *v.* New York &c. Ry., 159 Mass. 532.

[3] St. 1887, ch. 270, § 1, cl. 3; Perry *v.* Old Colony Ry., 164 Mass. 296.

[4] 43 & 44 Vict. cap. 42, s. 1, sub-s. 5; Colo. Sess. Laws, 1893, ch. 77, § 1, cl. 3.

[5] Alabama Code, § 2590, cl. 5.

or that two or more cars should be coupled together at that time. Thus, in Devine *v.* Boston & Albany Ry., 159 Mass. 348, a car-cleaner was injured by the car in which she was working striking a bunting-post with unusual force. It appeared that the cars from a train which had recently arrived at their destination were being distributed over the proper tracks under the charge or control of the conductor. Two cars, in one of which was the plaintiff, were kicked off with such force by the locomotive, owing to the failure of the conductor to give the stop-signal in time, that they bumped with great force against the bunting-post. It was held that the jury was justified in finding that the injury was due to the negligence of a person in charge of a train, although the cars were separated from the locomotive at the moment when they struck the post, and that the railroad company was liable in damages.

To the same effect is Caron *v.* Boston & Albany Ry., 164 Mass. 523.

In Dacey *v.* Old Colony Ry., 153 Mass. 112, 115, the court by Knowlton, J., defined a "train," within the meaning of the Massachusetts statute, as "a locomotive and one or more cars connected together and run upon a railroad."

Under the English act of 1880 it has been held that it is not necessary that a locomotive engine should be attached in order to constitute several cars a "train" within the meaning of the act; and that a number of trucks propelled along a line of rails in a goods station, by means of a stationary engine at a distance, constitutes a "train upon a railway" under section 1, sub-s.

5, of the statute.[1] In this case Mr. Justice Mathew says, on page 109: "Did the twelve trucks constitute a train? It seems to me that they did. A train is a train, whether consisting of trucks laden with goods, or of carriages filled with passengers. The character of the load makes no difference. Nor do I think that a locomotive engine is essential to the making of a train. The place where the accident occurred was clearly a part of the line of railway." The opinion of Mr. Justice Cave is to the same effect.

§ 71. "*Locomotive Engine.*"

Under the English act it has been decided that a steam crane fixed on a trolley, and propelled by steam along a set of rails when necessary to move it, and used for lifting heavy weights in constructing a railway, is not a "locomotive engine" within the meaning of the statute, and that therefore no action could be maintained for an injury caused by the negligence of the person in charge or control of the crane.[2] Pollock, B., says on page 525 of the case cited below: "The words used in the sub-section, in connection with the term 'locomotive engine,' refer exclusively to well-known things connected with the ordinary working of a railway. The machine in this case is intended to lift heavy weights of stone, and other materials used in constructing a railway, having besides an accidental power of applying its steam force to the trolley. If the legislature had intended to include any such machine, they would have used proper terms."

[1] Cox *v.* Great Western Ry., 9 Q. B. D. 106.
[2] Murphy *v.* Wilson, 52 L. J. (Q. B.) 524.

§ 72. "*Car.*"

The Alabama act, making a railroad liable for the negligence of any person having charge or control of a "car," applies to a hand-car as well as to an ordinary car.[1]

§ 73. "*Upon a Railroad.*"

A locomotive engine at rest upon the rails of a railroad round-house, where it had been left for temporary repairs, is not "upon a railroad" within the meaning of the Massachusetts Employers' Liability Act; and therefore one sent to repair it cannot recover for injuries received through the negligence of the defendant's employee in charge or control of the engine.[2]

§ 74. *Statutory Defects in Freight-Cars, Grab-irons and Draw-bars. Blocking of Frogs, Switches, and Guard-rails.*

The Massachusetts statute of 1895, ch. 362, requires locomotives and cars used in traffic within the State to be equipped with certain safety appliances. A failure on the part of a railroad corporation doing business within the State to comply with the requirements of this statute would probably render it liable for injuries caused thereby to its employees, under the Employers' Liability Act. The Act of Congress of March 2, 1893, ch. 196, 27 Stat. 531, relating to common carriers engaged in interstate commerce, contains like provisions respecting such common carriers and their employees.

[1] Richmond &c. Ry. *v.* Hammond, 93 Ala. 181; Kansas City &c. Ry. *v.* Crocker, 95 Ala. 412.

[2] Perry *v.* Old Colony Ry., 164 Mass. 296; 41 N. E. Rep. 289.

Sections 3 and 4 of this Massachusetts act declare that —

"Section 3. On and after the first day of July in the present year, and until otherwise ordered by the board of railroad commissioners, no railroad corporation shall use, in moving traffic between points in this Commonwealth, any car which is not provided with secure grab-irons or hand-holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars: provided, that this section shall not apply to flat cars which are equipped with automatic couplers such as are described in section 2.

"Section 4. The standard height of draw-bars for freight-cars, measured perpendicularly from the level of the top of the rails to the centres of the draw-bars, shall be thirty-four and one half inches for standard gauge railroads, and twenty-six inches for narrow gauge railroads, with a maximum variation from such standard height, in either case, of three inches between the draw-bars of empty and loaded cars; and, on and after the date last above named, no freight-car, either loaded or unloaded, shall be used in moving traffic between points in this Commonwealth with draw-bars which do not comply with the above standard."

Both the Massachusetts statute and the Act of Congress above mentioned expressly declare that an employee's continuance in the service with knowledge of the defect shall not be deemed an assumption of the risk of injury.[1] Even if these statutes had not contained this provision, the employee injured thereby would not have been precluded from recovering by

[1] Mass. St. 1895, ch. 362, § 7; 27 U. S. Statutes, 531, ch. 196, § 8.

such conduct and knowledge, because the defence based upon the maxim, *Volenti non fit injuria*, does not apply when the injury is caused by the employer's breach of a specific statutory duty imposed upon him for the protection of his employees. In Baddeley *v.* Granville, 19 Q. B. D. 423, this point was expressly decided with respect to the Coal Mines Regulation Act, 1872, which required a banksman to be kept at the mouth of a coal-pit while the miners were going up or down the shaft.

The Massachusetts statute of 1894, ch. 41, entitled "An act to provide for the blocking of railroad frogs, switches, and guard-rails," does not contain any provision which prevents such conduct on the part of the employee from amounting to an assumption of the risk of injury caused by a failure of the railroad to comply with the terms of the statute. Section 1 of this act reads as follows: —

"Section 1. Every railroad corporation shall, before the first day of October in the present year, block, or cause to be blocked, the frogs, switches, and guard-rails, excepting guard-rails on bridges, in or connected with any and all railroad tracks operated or used by it in this Commonwealth, and shall thereafter keep the same so blocked by some method or methods approved by the board of railroad commissioners, so as to prevent employees from being caught therein."

§ 75. *"Charge or Control" for Temporary Purpose.*

Under the Massachusetts and Alabama acts it has been held that, to constitute a person one in "charge or control" of a train, etc., it is not necessary that he should have the general or usual charge or control of

it, but it is sufficient if he has the charge or control for a temporary purpose, or for the time being.[1] In Steffe *v.* Old Colony Ry., 156 Mass. 262, 264, 265, Mr. Justice Allen, in delivering the court's opinion, says: —

"The question is, was there evidence warranting the jury in finding that Thompson, the brakeman, was in charge or control of the train? In the opinion of a majority of the court, there was. The statute obviously implies that some person is to be regarded as being in charge or control of a moving train, and makes the defendant responsible for the negligence of any person in its service who has such charge or control. It is not necessary that he should be a conductor, or have any other particular office or position. The statute includes every person, and must be deemed to mean any person who has such charge or control for the time being. Ordinarily, one who is to determine whether the train is to move or remain stationary, and who is to give directions as to the moving or stopping of the train, may be said to be in the charge or control of it. In the case before us, the only persons upon the train were the engineer and the brakeman."

In England, however, it has been held by the Court of Appeal in Gibbs *v.* Great Western Ry., 12 Q. B. D. 208, that to fall within the meaning of the English act of 1880 the person must have the *general* charge or control, and that a charge or control at a particular time when the negligence was committed is not sufficient to render the common employer liable. In this case an engine-driver was killed through the negligence

[1] Steffe *v.* Old Colony Ry., 156 Mass. 262; Louisville &c. Ry. *v.* Richardson, 100 Ala. 232.

of one Fisher in leaving the cover of a box containing machinery, which it was his duty to oil, on the track, causing a derailment of the train. The testimony showed that Fisher's duty was to clean, oil, and adjust the wires and locking apparatus connected with the points; that the points were worked from the signal-box; that Fisher had a boy to assist him in his work; and that one Saunders, an inspector, had general charge of the points. It was held that the evidence would not warrant a finding that Fisher had the charge or control of the points within the meaning of the statute. The Master of the Rolls, Brett, says on page 212: "I think that to be such a person he should be one who has the general charge of the points, and not one who merely has the charge of them at some particular moment."

§ 76. *"Charge or Control" of Train.*

The mere fact that the conductor of a freight train is temporarily absent from the train upon a duty connected with the proper management of the train is not conclusive proof that he was not in the "charge or control" of the train at the time of the injury, within the meaning of the Massachusetts act. Upon such evidence the jury is justified in finding that he was in the charge or control thereof, and a verdict for the plaintiff will not be set aside on that ground, especially when it does not appear that anything contrary to his orders or expectations was done during his absence.[1]

In Dacey *v.* Old Colony Ry., 153 Mass. 112, a brakeman was killed by being crushed between a moving car which he was in the act of boarding and a stationary

[1] Donahoe *v.* Old Colony Ry., 153 Mass. 356.

car so near it on another track as to leave a space of less than five inches between them. The injury occurred upon a dark night in the freight yard of the defendant in Taunton, which was an extensive one, with thirteen tracks. The plaintiff, who was the administratrix of the deceased brakeman, contended that the injury was caused by the negligence of a person in the service of the defendant, who had charge or control of a locomotive engine or train upon its railroad, in leaving the stationary car standing so near the other track. The only evidence as to who left this car in its dangerous position was that during the afternoon the day gang, under the direction of its conductor, had been engaged in placing cars upon that track. The court held that the questions of whether the stationary car was left in that position through the negligence of a person in charge of a train, and whether the brakeman was in the exercise of due care, should have been left to the jury.

In Thyng *v.* Fitchburg Ry., 156 Mass. 13, a freight brakeman was killed by reason of the negligence of some one in putting too short a coupling-pin between two freight-cars, which caused them to break apart and to throw the deceased under the rear car. The train was made up in the yard under the direction of the conductor of a switch-engine, and the plaintiff contended that the injury was due to his negligence, and that he was a person in "charge or control" of a train within the meaning of the act. But the court held that the persons who made up the train were fellow-servants of the deceased, and that his administratrix could not recover. The court, speaking through Mr. Justice Knowlton, says: —

"A conductor of a switch-engine which is drawing several cars under his direction may be, for the time, in charge of a train consisting of the engine and cars.[1] But there is nothing to show that this conductor of a switch-engine was at any time negligent in his charge or management of such a train, or of the engine attached to it, or that his conduct in reference to such a train had any connection with the accident. His only relation to the train on which the plaintiff [deceased] worked was to bring the cars together and make the train up. His duties were ended as soon as the cars were connected so as to make a train. He never had charge or control of those cars as a train, but he was to determine what cars should be brought together to constitute the train, and see that they were properly coupled and ready to be taken away. . . . The legislature in this part of the statute has gone no further than to include those whose duties relate to the charge of a locomotive engine, or the train when complete." Page 18.

In Caron *v.* Boston & Albany Ry., 164 Mass. 523, 528, the court, through Mr. Justice Morton, says: "It is *the* charge or control of which the statute speaks, and not *a* charge or control; and it is the charge or control of the train as a connected whole which is meant, not of portions which together form a whole. Thyng *v.* Fitchburg Railroad, *ubi supra.* We think, therefore, that by the words 'any person . . . who has the charge or control' is meant a person who, for the time being at least, has immediate authority to direct the movements and management of the train as a

[1] Citing Dacey *v.* Old Colony Ry., 153 Mass. 112.

whole, and of the men engaged upon it." It was accordingly held that a brakeman acting under the supervision of a conductor is not a person in the charge or control of a train.

§ 77. *Brakeman or Other Employee may have Charge or Control of a Train.*

By the Massachusetts statute a railroad company is made liable to its employees for the negligence of "any person" in its service who has charge or control of a train. It is not necessary that such person should be a conductor, or have any particular office. "Ordinarily, one who is to determine whether the train is to move or remain stationary, and who is to give directions as to the moving or stopping of the train, may be said to be in the charge or control of it." A brakeman may be such a person.

Thus in Steffe *v.* Old Colony Ry., 156 Mass. 262, a car-inspector was injured through the negligence of a brakeman on a train who failed to give him warning of its approach or to stop the train. The engineer and the brakeman were the only persons upon the train; the train was backing, and the brakeman was stationed at the rear end of the car to watch the track, and to warn any person on the track of its approach, and to stop the train either by the automatic brake or by signalling to the engineer. It was held that this evidence warranted the jury in finding that the brakeman was in charge or control of the train, and that the railroad company was liable for his negligence. In the language of the court, by Allen, J.: "The statute includes every person, and must be deemed to mean

any person, who has charge or control for the time being." Page 264. If the action had been at common law, the plaintiff could not have recovered.[1]

Under the English statute, it has been held that a "capstan-man" may be a person in charge or control of a train. In Cox *v.* Great Western Ry., 9 Q. B. D. 106, the plaintiff was injured through the negligence of a person in the defendant's employ known as a "capstan-man," whose duty it was to propel, by means of a stationary engine at a distance, trucks laden with goods along a line of rails in a goods station. His negligence consisted in a failure to give the usual warning that he had sent the trucks down the line towards the plaintiff, who was engaged in similar work at the other end of the line, about one hundred yards distant. It was held that the evidence would warrant a finding that the capstan-man was a person in charge or control of a train upon a railway.

§ 78. *Different Views at Common Law concerning Person in Charge or Control of Train.*

At common law, in most jurisdictions, the conductor or other person having the charge or control of a moving train is deemed a fellow-servant with a common laborer employed upon the track, and therefore the railroad company is not liable to either for an injury caused by the negligence of the other employee. The different views are thus summarized by the Supreme Court of the United States, speaking through Mr. Justice Brown, in the recent case of Northern Pacific Ry. *v.* Hambly, 154 U. S., 349, 355, 356: —

[1] Gillshannon *v.* Stony Brook Ry., 10 Cush. 228; Seaver *v.* Boston & Maine Ry., 14 Gray, 466.

"There is probably no subject connected with the law of negligence which has given rise to more variety of opinion than that of fellow-service. The authorities are hopelessly divided upon the general subject as well as upon the question here involved. It is useless to attempt an analysis of the cases which have arisen in the courts of the several States, since they are wholly irreconcilable in principle, and too numerous even to justify citation. It may be said in general that, as between laborers employed upon a railroad track and the conductor or other employees of a moving train, the courts of Massachusetts, Rhode Island, New York, Indiana, Iowa, Michigan, North Carolina, Minnesota, Maine, Texas, California, Maryland, Pennsylvania, Arkansas, and Wisconsin hold the relation of fellow-servants to exist;[1] while in Illinois, Missouri, Virginia, Ohio, and Kentucky the rule is apparently the other way.[2] The cases in Tennessee seem to be divided."[3]

[1] Citing Farwell *v.* Boston & Worcester Ry., 4 Met. 49; Clifford *v.* Old Colony Ry., 141 Mass. 564; Brodeur *v.* Valley Falls Co., 16 R. I. 448; Harvey *v.* New York Central Ry., 88 N. Y. 481; Gormley *v.* Ohio &c. Ry., 72 Ind. 31; Collins *v.* St. Paul &c. Ry., 30 Minn. 31; Pennsylvania Ry. *v.* Wachter, 60 Md. 395; Houston &c. Ry. *v.* Rider, 62 Texas, 267; St. Louis &c. Ry. *v.* Shackelford, 42 Ark. 417; Blake *v.* Maine Central Ry., 70 Me. 60; Ryan *v.* Cumberland Valley Ry., 23 Pa. St. 384; Sullivan *v.* Mississippi &c. Ry., 11 Iowa, 421; Fowler *v.* Chicago &c. Ry., 61 Wis. 159; Kirk *v.* Atlantic &c. Ry., 94 N. C. 625; Quincy Mining Co. *v.* Kitts, 42 Mich. 34; Keystone Bridge Co. *v.* Newberry, 96 Pa. St. 246.

[2] Citing Chicago &c. Ry. *v.* Moranda, 93 Ill. 302; Sullivan *v.* Missouri Pacific Ry., 97 Mo. 113; Richmond &c. Ry. *v.* Normont, 4 S. E. Rep. 211; Dick *v.* Railroad Co., 38 Ohio St. 389; Louisville &c. Ry. *v.* Caven, 9 Bush (Ky.), 559; Madden *v.* Chesapeake &c. Ry., 28 W. Va. 610.

[3] Citing East Tennessee &c. Ry. *v.* Rush, 15 Lea, 145; Louisville &c. Ry. *v.* Robertson, 9 Heisk. 276; Haley *v.* Mobile &c. Ry., 7 Baxter, 239; Nashville &c. Ry. *v.* Jones, 9 Heisk. 27; East Tennessee &c. Ry. *v.* Gurley, 12 Lea, 46.

The point decided in Northern Pacific Ry. *v.* Hambly, 154 U. S. 349, was that the conductor and engineer of a railroad train are fellow-servants with a common day-laborer, who, while working for the company under a section boss on a culvert, receives an injury through their negligence in moving and operating a passenger train, and he therefore cannot recover of the common employer, the railroad company.[1]

A conductor is not a fellow-servant with the engineer of the same train, because the conductor has the general management and control of the train and represents the common employer, the railroad company. Hence the railroad company is liable to the engineer for an injury caused by the negligence of the conductor.[2]

A conductor is a vice-principal towards a brakeman on the same train, and the railroad company is liable to the brakeman for an injury caused through the conductor's negligence.[3]

§ 79. *Who may have the Charge or Control of Locomotive Engine.*

In Louisville &c. Ry. *v.* Richardson, 100 Ala. 232, the plaintiff, while engaged in wiping grease off of a switch-engine, was scalded through the negligence of a hostler in opening the throttle and permitting the steam to blow out into his face. The engineer was

[1] Following Randall *v.* Baltimore & Ohio Ry., 109 U. S. 478; Quebec Steamship Co. *v.* Merchant, 133 U. S. 375; Baltimore & Ohio Ry. *v.* Baugh, 149 U. S. 368: distinguishing Chicago &c. Ry. *v.* Ross, 112 U. S. 377.

[2] Chicago &c. Ry. *v.* Ross, 112 U. S. 377, 394.

[3] Canadian Pacific Ry. *v.* Johnston, 61 Fed. Rep. 738.

standing on the ground, packing a gland-valve. There was evidence that the hostler, whose regular duty it was to move road-engines about the yard, had been ordered not to move switch-engines, but that he frequently did move them, and that he got on the engine at the time in question for the purpose of moving it. There was no evidence that the engineer and hostler had any joint control over the engine. The presiding justice refused to rule that, if the engineer was in charge or control of the engine at the time of the accident, the plaintiff could not recover. On appeal, however, it was held that the refusal to give the instruction requested was reversible error. In the court's opinion, delivered by Mr. Justice Haralson, it is said on page 236: —

"The question as to what person, on the occasion of the injury to the plaintiff, had charge or control of the engine, is one of fact, properly left to the jury, with instructions under the evidence in the cause. Generally, we would say, especially when he is on and running the engine, or has the actual custody, that the engineer has control of it. It may be, however, when he is not in the active manipulation of it, that other persons control it. It will not do to say, therefore, as a matter of law, who has the control or charge of an engine, at any particular time, when it is fairly inferable from the evidence that either one or the other of two persons may have such control. In each particular case time, place, and circumstances must determine the question of immediate control."

In Louisville &c. Ry. *v.* Mothershed, 97 Ala. 261, 267, Mr. Justice Coleman, in delivering the court's

opinion, says: "If McNutt, the yard-master and the superior of all the other employees present, personally took the place of the engineer and was running the engine at the time of the accident, the defendant railroad company would be liable for his negligence, the same as if the engineer himself had been in charge and had been guilty of the same act of negligence."

At common law, the engineer and fireman of a locomotive engine are fellow-servants, and their common employer, the railroad company, is not liable to either for the negligence of the other. Even when the engine is run alone without a train attached, and a rule of the company provides that in such case the engineer shall be "regarded as conductor, and will act accordingly," the company is not liable to the fireman for the negligence of the engineer.[1]

§ 80. *Who may have the Charge or Control of a Car.*

The foreman of a gang of men using a hand-car may be a person in charge or control of a car, within the meaning of the Alabama statute.[2]

At common law, a car-inspector is a fellow-servant with a freight brakeman, and therefore the common employer is not liable to the brakeman for the negligent act of the inspector.[3]

[1] Baltimore & Ohio Ry. *v.* Baugh, 149 U. S. 368. (*Contra* in Ohio, it seems, where the doctrine of "superior servant" prevails. Little Miami Ry. *v.* Stevens, 20 Ohio, 415; Cleveland &c. Ry. *v.* Keary, 3 Ohio St. 201; Berea Stone Co. *v.* Kraft, 31 Ohio St. 287, 291, 292.)

[2] Kansas City &c. Ry. *v.* Crocker, 95 Ala. 412.

[3] Smoot *v.* Mobile &c. Ry., 67 Ala. 13; Dewey *v.* Detroit &c. Ry., 97 Mich. 329. *Contra*, Cooper *v.* Pittsburgh &c. Ry., 24 W. Va. 37; Missouri Pacific Ry. *v.* Condon, 17 Am. & Eng. R. R. Cases, 589; s. c., 78 Mo. 567.

§ 81. *Negligence of Person in Charge or Control of Signal, Switch, Engine, Car, etc.*

In Richmond &c. Ry. *v.* Jones, 92 Ala. 218, a switchman while uncoupling cars was injured by the backing of the locomotive and its collision with the car. The plaintiff was standing on the foot-board of the engine-tender, and gave the signal by his lantern to go ahead. The fireman gave the signal to the engineer to back. The presiding judge charged the jury that, if the fireman was placed there to receive signals from the switchman, and to communicate them to the engineer, and that instead of giving the go-ahead signal he gave the back-up signal, and thereby caused the plaintiff's injury, the plaintiff could recover against the railroad company under the Employers' Liability Act. The Supreme Court, in affirming this ruling, says on page 227, by Mr. Justice Coleman: —

"The evidence tended to show that it was the duty of firemen to receive signals from switchmen, and transmit them to the engineer. If the injury to plaintiff was caused by negligence of the fireman in transmitting the signals to the engineer, given to him for that purpose by the plaintiff in the discharge of his duty as a switchman, such injury is clearly within the provision of the Employers' Liability Act."

The court does not specify the precise clause under which the defendant was liable, but it seems to fall under the clause making a railroad company liable to its employees for the negligence of any person in its service having the charge or control of any signal, engine, or train upon a railway.

A person having the charge or control of railroad cars who places one of them in such close proximity to another track as to knock off a brakeman upon a passing freight-car upon the latter track, while in the proper and careful discharge of his duty, is guilty of negligence, for which the common employer is liable under the Alabama statute.[1]

The failure of one in charge of a locomotive engine to stop or slow up in approaching a switch, as required by the rules of the railroad company, is actionable negligence, for which the railroad is liable to another employee for an injury caused thereby.[2]

The foreman of a gang of men on a hand-car who, while the car is in rapid motion on a down grade, suddenly applies the brake and checks its speed without warning to the men, whereby the plaintiff is thrown off the car and run over, is guilty of negligence; and if such foreman had the charge or control of the car at the time, an action may be maintained against the common employer, a railroad company, under the Alabama Employers' Liability Act.[3]

§ 82. *Railroads operated by Receivers.*

The fact that a railroad is in the hands of a receiver does not prevent an employee from recovering damages for personal injuries received through the negligence of a fellow-servant under the statute of the State of injury. Such a state statute changing the rule of the common law applies to receivers operating railroads

[1] Kansas City &c. Ry. *v.* Burton, 97 Ala. 240.
[2] Louisville &c. Ry. *v.* Mothershed, 97 Ala. 261.
[3] Kansas City &c. Ry. *v.* Crocker, 95 Ala. 412.

under appointment from federal courts, as well as to the railroads themselves.[1]

§ 83. *Same. Prior Leave of Appointing Court to sue.*

Irrespective of statute, it is held in most jurisdictions that a railroad receiver cannot be sued without prior leave of the appointing court. Without such leave the court has no jurisdiction, and must dismiss the suit.[2] Congress has, however, changed this rule in regard to federal receivers,[3] and this statute authorizes suits against such receivers both in the state courts[4] and in the federal courts[5] without prior leave of the appointing court.

§ 84. *Constitutionality. Discrimination against Railroads.*

The fact that the Employers' Liability Acts discriminate against railroads by imposing greater liabilities upon them for personal injuries received by their employees than upon other classes of employers does not render the statutes unconstitutional.

With respect to the so-called "railroad acts," which make railroad companies liable for injuries to employees

[1] Hornsby *v.* Eddy, 56 Fed. Rep. 461 ; s. c., 5 C. C. A. 560 ; Rouse *v.* Hornsby, 67 Fed. Rep. 219 ; Murphy *v.* Holbrook, 20 Ohio St. 137 ; Paige *v.* Smith, 99 Mass. 395 ; Little *v.* Dusenberry, 46 N. J. Law, 614. *Contra*, Turner *v.* Cross, 83 Tex. 218.

[2] Barton *v.* Barbour, 104 U. S. 126 ; Robinson *v.* Atlantic &c. Ry., 66 Pa. St. 160; Palys *v.* Jewett, 32 N. J. Eq. 302 ; Noe *v.* Gibson, 7 Paige (N. Y.), 513.

[3] 24 Stat. 554, March 3, 1887, ch. 373, § 3.

[4] McNulta *v.* Lochridge, 141 U. S. 327.

[5] Texas &c. Ry. *v.* Cox, 145 U. S. 593.

caused by the negligence of co-employees, without imposing that liability upon other classes of employers, it is settled that they are not unconstitutional as depriving railroads of their property without due process of law, nor as denying to them the equal protection of the law, within the meaning of the Fourteenth Amendment to the United States Constitution.[1]

In Missouri Pacific Ry. *v.* Mackey, 127 U. S. 205, a fireman was injured through the negligence of an engineer, both being in the service of the railroad company. The fireman sued the railroad in a state court of Kansas, under the Kansas statute of 1874, which reads as follows: —

"Every railroad company organized or doing business in this State shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage."

The plaintiff recovered a verdict for $12,000, and, after judgment in the state court, the defendant carried the case up to the United States Supreme Court. That court affirmed the judgment, for the following reasons, as stated by Mr. Justice Field: —

"At the trial, and in the Supreme Court of the State, it was contended by the defendant (and the contention

[1] Missouri Pacific Ry. *v.* Mackey, 127 U. S. 205, affirming Missouri Pacific Ry. *v.* Mackey, 33 Kans. 298; Minneapolis &c. Ry. *v.* Herrick, 127 U. S. 210, affirming Herrick *v.* Minneapolis &c. Ry., 31 Minn. 11; Bucklew *v.* Central Iowa Ry., 64 Iowa, 603; Missouri Pacific Ry. *v.* Haley, 25 Kans. 35; Chicago &c. Ry. *v.* Pontius, 52 Kans. 264; Chicago &c. Ry. *v.* Pontius, 157 U. S. 209; Chicago &c. Ry. *v.* Stahley, 62 Fed. Rep. 363.

is renewed here) that the law of Kansas of 1874 is in conflict with the Fourteenth Amendment of the Constitution of the United States, in that it deprives the company of its property without due process of law, and denies to it the equal protection of the laws.

"In support of the first position the company calls the attention of the court to the rule of law exempting from liability an employer for injuries to employees caused by the negligence or incompetency of a fellow-servant, which prevailed in Kansas and in several other States previous to the act of 1874, unless he had employed such negligent or incompetent servant without reasonable inquiry as to his qualifications, or had retained him after knowledge of his negligence or incompetency. The rule of law is conceded where the person injured, and the one by whose negligence or incompetency the injury is caused, are fellow-servants in the same common employment, and acting under the same immediate direction. Chicago & Milwaukee Ry. *v.* Ross, 112 U. S. 377, 389. Assuming that this rule would apply to the case presented but for the law of Kansas of 1874, the contention of the company, as we understand it, is that that law imposes upon railroad companies a liability not previously existing, in the enforcement of which their property may be taken; and thus authorizes in such cases the taking of property without due process of law, in violation of the Fourteenth Amendment. The plain answer to this contention is, that the liability imposed by the law of 1874 arises only for injuries subsequently committed; it has no application to past injuries, and it cannot be successfully contended that the State may not prescribe

the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every State. The hardship or injustice of the law of Kansas of 1874, if there be any, must be relieved by legislative enactment. The only question for our examination, as the law of 1874 is presented to us in this case, is whether it is in conflict with clauses of the Fourteenth Amendment. The supposed hardship and injustice consist in imputing liability to the company where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship and injustice, if there be any, exist when the company, without any wrong or negligence on its part, is charged with injuries to passengers. Whatever care and precaution may be taken in conducting its business or in selecting its servants, if injury happen to the passengers from the negligence or incompetency of the servants, responsibility therefor at once attaches to it. The utmost care on its part will not relieve it from liability if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine and fixes a like liability upon railroad companies where injuries are subsequently suffered by employees, though it may be by the negligence or incompetency of a fellow-servant in the same general employment and acting under the same immediate direction. That its passage was within the competency of the legislature we have no doubt.

"The objection, that the law of 1874 deprives the railroad companies of the equal protection of the laws,

is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition, but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers, are instances of this kind. Such legislation does not infringe upon the clause of the Fourteenth Amendment, requiring equal protection of the laws, because it is special in its character; if in conflict at all with that clause, it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. A law giving to mechanics a lien on buildings constructed or repaired by them, for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges

conferred and the liabilities imposed. It is conceded that corporations are persons within the meaning of the amendment. Santa Clara County *v.* Southern Pacific Railroad Co., 118 U. S. 394; Pembina Consolidated Silver Mining and Milling Co. *v.* Pennsylvania, 125 U. S. 187. But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage-coaches and to persons and corporations using steam in manufactories. See Missouri Pacific Ry. Co. *v.* Humes, 115 U. S. 512, 523; Barbier *v.* Connolly, 113 U. S. 27; Soon Hing *v.* Crowley, 113 U. S. 703."

§ 85. *Same.*

In Minneapolis &c. Ry. *v.* Emmons, 149 U. S. 364, it was held that a statute of Minnesota requiring all railroad companies to fence their tracks, and making them liable for domestic animals killed or injured by their negligence, and declaring that a failure to build and maintain such fences shall be deemed "an act of negligence on the part of such companies," is constitu-

tional and valid. In delivering the opinion, Mr. Justice Field says, on page 367 : —

"No discrimination is made against any particular railroad companies or corporations ; all are treated alike, and required to perform the same duty ; and therefore no invasion was attempted of the equality of protection ordained by the Fourteenth Amendment."

It has also been decided that such statutes are not contrary to a constitutional provision that all laws shall be of "uniform operation throughout the State."[1] Nor are they contrary to a clause which prohibits unequal and partial legislation on general subjects.[2] Nor do they impair the obligation of preëxisting contracts in the form of a charter granted by the State to a private corporation.[3]

Cases in which other constitutional objections to such legislation have been held untenable are cited below.[4]

In Alabama, however, contrary to the great weight of authority cited above, it has been decided that a statute giving a right of action to the parent of a minor child killed by the wrongful act of any agent or officer of a corporation or firm, without imposing a like liability upon an individual, discriminates against corporations and firms, and is unconstitutional under article 14, § 12, of the state Constitution.[5] This point does not seem to have been raised or decided under the Employers' Liability Act, though many cases against railroads under this clause have been decided.

[1] McAunich *v.* Mississippi &c. Ry., 20 Iowa, 338.

[2] Ditberner *v.* Chicago &c. Ry., 47 Wis. 138.

[3] Shelby County *v.* Scearce, 2 Duvall (Ky.), 576.

[4] Sherlock *v.* Alling, 93 U. S. 99 ; Georgia Ry. *v.* Oaks, 52 Ga. 410 ; Boston &c. Ry. *v.* State, 32 N. H. 215.

[5] Smith *v.* Louisville &c. Ry., 75 Ala. 449.

CHAPTER VI.

MISCELLANEOUS POINTS.

Section
86. I. Negligence of person entrusted with duty of seeing that ways, etc., are in proper condition.
87. Same.
88. Same. Inspectors of foreign cars.
89. Same. Road-master and section foreman.
90. Same. Injury to such person himself.
Section
91. II. Negligence of person to whose orders plaintiff was bound to conform. Alabama cases.
92. Same. English cases.
93. III. Injury to employee of independent contractor.
94. Same. Contractor may act in another capacity.

I.

§ 86. *Negligence of Person entrusted with Duty of seeing that the Ways, etc., are in Proper Condition.*

The first section of the Massachusetts act of 1887, ch. 270, gives an employee a right of action against an employer when he is injured —

"(1) By reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer and entrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition." The statutes of England, of Ala-

bama, of Colorado, and of Indiana all contain like provisions upon this subject.

This clause in the Massachusetts statute is chiefly declaratory of common-law principles. Prior to the passage of the act, it was there regarded as part of the employer's duty to use ordinary care in providing suitable ways, works, machinery, and plant for carrying on the work, and he could not escape liability to an employee who was injured by a defect therein by delegating the performance of this duty to another employee.[1]

The common law of England was different from that of Massachusetts upon this point. In England, before the passage of the act, the employer was not liable for injury to his employee caused by the negligence of a fellow-servant who had been entrusted by the master with this duty.[2]

But since the passage of the act the employer is liable for an injury so caused, and, as the right of action is there merely statutory, the employee must comply with the terms and conditions of the statute.[3]

At common law the employer was also bound to use ordinary care to provide proper employees to carry on the business, and could not delegate the performance

[1] Snow *v.* Housatonic Ry., 8 Allen, 441; Gilman *v.* Eastern Ry., 13 Allen, 433; Lawless *v.* Connecticut River Ry., 136 Mass. 1; Ryalls *v.* Mechanics' Mills, 150 Mass. 190. See, also, Hough *v.* Railway Co., 100 U. S. 213; Gardner *v.* Michigan Central Ry., 150 U. S. 349, 359; Mullan *v.* Philadelphia &c. Steamship Co., 78 Pa. St. 25; Shanny *v.* Androscoggin Mills, 66 Me. 420; Ashman *v.* Flint &c. Ry., 90 Mich. 567.

[2] Wilson *v.* Merry, L. R. 1 H. L. Sc. 326.

[3] Griffiths *v.* Dudley, 9 Q. B. D. 357; Morrison *v.* Baird, 10 Ct. of Sess. Cas. (4th series), 271; Yarmouth *v.* France, 19 Q. B. D. 647.

of this duty to any one else. If he was negligent in this respect, either in procuring or in keeping incompetent employees in his service, and injury resulted to an employee by reason of such incompetency, the employer was liable in damages.[1]

§ 87. *Same.*

To justify a recovery under these statutes on the ground of a defect in the condition of the defendant's ways, works, machinery, or plant, it is not sufficient for the plaintiff to show that a defect existed, and that it caused the injury: he must also prove that the defect arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person charged with that duty; and, in the absence of such proof, the judge should direct a verdict for the defendant.[2] In the Alabama case just cited a car-repairer alleged that his injury was caused by a defective brake on a railroad car. While he was engaged in repairing a car which had been put on the repair track for that purpose, and while he was under the car, another car, belonging to another railroad company, which car the defendant railroad was using, was run in upon the repair track with such force as to drive a stationary car upon the car which the plaintiff was repairing, causing his injuries. The foreign car had

[1] McPhee *v.* Scully, 163 Mass. 216; Gilman *v.* Eastern Ry., 13 Allen, 433; Keith *v.* New Haven &c. Ry., 140 Mass. 175; Wabash Ry. *v.* McDaniels, 107 U. S. 454; Whittaker *v.* Delaware &c. Ry., 126 N. Y. 544; Baulec *v.* New York &c. Ry., 59 N. Y. 356; Hilts *v.* Chicago &c. Ry., 55 Mich. 437.

[2] Louisville &c. Ry. *v.* Davis, 91 Ala. 487; O'Maley *v.* South Boston Gas Light Co., 158 Mass. 135, 137.

a defective brake, which prevented its speed being checked in time to avoid the collision. It had been condemned to the repair track on account of a defective wheel, no defect having been discovered in the brake prior to the accident. The jury returned a verdict in favor of the plaintiff for $15,000, upon which judgment was entered in the trial court.

In reversing this judgment, the Supreme Court says by Mr. Justice McClellan, on page 494: "There is evidence in this record that the brake was defective; but this testimony exhibits no tendency whatever to show that the defect was caused by the negligence of the defendant, or any employee, or had not been discovered or remedied because of any negligence on the part of the defendant or its employees. Without such evidence, no recovery could be had under that count, and the court should have so instructed the jury, as requested in the fourth charge asked by the defendant."[1]

On the other hand, the statute has not the effect of cutting down or restricting the common-law rights of the employee, either as to the amount of damages recoverable, or as to the requirement of notice. If, before the passage of the statute, the employee could recover, he can now recover since its passage, without giving notice of the injury. Nor is his recovery limited to the amount stated in the act. In other words, the statute does not codify the whole law upon the subject, and does not prevent an action at common

[1] Citing Atchison &c. Ry. *v.* Ledbetter, 21 Am. & Eng. R. R. Cases, 555; s. c., 34 Kans. 326.

law, but leaves open some common-law liabilities and some common-law defences.[1]

§ 88. *Same. Inspectors of Foreign Cars.*

At common law in Massachusetts a car-inspector was considered a fellow-servant with a brakeman, engineer, etc., and the railroad company was not liable to the others for his negligence in failing to discover a defect in a foreign car, which the defendant company was merely forwarding for another road and not using for its own benefit.[2] Under the Massachusetts Employers' Liability Act of 1887, however, a car-inspector is a person entrusted with the duty of seeing that the railroad's ways, works, or machinery are in proper condition.[3] As the amendatory act of 1893, ch. 359, provides that "a car in use by or in the possession of a railroad company shall be considered a part of the ways, works, or machinery of the company using or having the same in possession, within the meaning of this act, whether such car is owned by it or by some other company or person," it follows that a railroad company is liable to one of its employees who is injured by the negligence of its car-inspector in failing to properly inspect a foreign car.[4]

Even under the act of 1887, before the passage of

[1] Ryalls *v.* Mechanics' Mills, 150 Mass. 190.

[2] Mackin *v.* Boston & Albany Ry., 135 Mass. 201. See, also, Kelly *v.* Abbot, 63 Wis. 307; Smith *v.* Flint &c. Ry., 46 Mich. 258.

[3] Bowers *v.* Connecticut River Ry., 162 Mass. 310.

[4] This statute of 1893 changes the rule of construction under the act of 1887, adopted in Thyng *v.* Fitchburg Ry., 156 Mass. 13, in which it was held that such a foreign car was not a part of the "ways, works, or machinery connected with or used in the business of the employer."

the act of 1893, a railroad company, which allowed a custom or habit to prevail of not inspecting foreign cars which came from a particular direction, was liable to an employee who was injured by such negligence on a car which came from that direction and had not been inspected; for such custom or habit constitutes negligence either of the railroad company itself, or of its superintendent, or of some person in its service, in failing to provide proper inspection.[1] And at common law, where the inspector is incompetent, the defendant is liable to its injured employee though the car belongs to another road and the defendant is merely forwarding it.[2]

If the employer uses a foreign car for his own benefit, he is bound by the rule which requires him to furnish proper appliances, even in those States which hold the contrary, when he merely forwards the foreign car without using it for his benefit.[3]

In Walsh *v.* New York &c. Ry., 160 Mass. 571, it was held that the jury was warranted in finding, on the evidence, that by the law of Connecticut, where the injury occurred, a railroad company is bound to see that foreign cars are reasonably inspected, even if they are not used by the defendant; and that by the Connecticut law the railroad cannot escape liability by delegating this duty to a competent inspector, but is liable for his negligence in failing to inspect. The jury having found such to be the law of Connecticut,

[1] Coffee *v.* New York &c. Ry., 155 Mass. 21.

[2] Keith *v.* New Haven &c. Ry., 140 Mass. 175.

[3] Spaulding *v.* Flynt Granite Co., 159 Mass. 587; Cowan *v.* Chicago &c. Ry., 80 Wis. 284.

the Massachusetts court held that the injured employee was entitled to recover damages in Massachusetts, although the common law of Massachusetts was the contrary.[1]

§ 89. *Same. Road-master and Section Foreman.*

A road-master and a section foreman of a railroad company are persons entrusted with the duty of seeing that the track is kept in good condition, and if they are negligent in failing to discover or remedy a defect in the track, by reason of which a locomotive is derailed and the engineer injured, the common employer is liable under the Employers' Liability Act.[2]

§ 90. *Same. Injury to Such Person Himself.*

Where the injured employee was himself entrusted with the duty of seeing that the ways, etc., were in proper condition, he cannot recover under the statute for a defect in their condition. In Birmingham Furnace Co. *v.* Gross, 97 Ala. 220, a master mechanic, while repairing a tall chimney of a gas furnace, was overcome by gas, fell off the ladder, and was killed. His administrator claimed that the failure to provide a scaffold or platform instead of a ladder was a defect in the condition of the ways, works, etc., for which the defendant was liable. But it further appeared that the deceased himself was the person entrusted with the duty of seeing that the ways, works, machinery, or plant were in proper condition, and it was accordingly held that the plaintiff could not recover, and that the

[1] Mackin *v.* Boston & Albany Ry., 135 Mass. 201.

[2] Kansas City &c. Ry. *v.* Webb, 97 Ala. 157.

presiding justice should have ordered a verdict for the defendant.

II.

§ 91. *Negligence of Person to whose Orders Plaintiff was bound to conform. Alabama Cases.*

The third clause of § 2590 of the Alabama Code gives a right of action to an employee who is injured by reason of the negligence of any person in the service of the employer to whose orders or directions the employee, at the time of the injury, was bound to conform, and did conform, if his injury results from having so conformed. The English act of 1880 contains a like provision in section 1, sub-section 3. The Indiana statute of 1893 also has a like clause; but the act itself does not apply to employers in general, but merely to corporate employers, and excepts municipal corporations. The statutes of Massachusetts and of Colorado do not render an employer liable for the negligence of such person.

It has been held that this clause in the Alabama act applies only to *special* orders or directions, in respect to the particular service in which the employee is engaged at the time of the injury, as distinguished from a general order or direction in reference to the discharge of his general service, growing out of the nature and scope of his employment.[1]

To recover under this clause, the plaintiff must establish four propositions: (1) that the person who gave the orders was in the service of the defendant; (2) that the plaintiff was bound to conform to the orders

[1] Mobile &c. Ry. *v.* George, 94 Ala. 199, 219.

of such person; (3) that he did conform to such orders, and that his injury resulted from having so conformed; and (4) that such person was negligent in giving such orders.

In Mobile &c. Ry. *v.* George, 94 Ala. 199, a brakeman was injured while attempting to uncouple cars from an engine. One count alleged that the plaintiff was ordered by the yard-master to uncouple the cars from the engine, but there was no evidence that, at the time of the injury, the yard-master gave him an order to uncouple the cars from the engine. As there was no special order to do the uncoupling of those particular cars and engine, it was held that the plaintiff could not recover under this clause.

An order to a switchman to "cut off one car" from a freight train given by a foreman who was five or six car lengths away, where there was no emergency or cause for haste, will not justify the switchman in undertaking to uncouple freight-cars while in motion, and if he is injured in the attempt the railroad company is not liable therefor.[1]

§ 92. *Same. English Cases.*

In England it has been decided that it is not necessary that the order complained of should be in express words, but that it may be implied from the surrounding circumstances. In Millward *v.* Midland Ry., 14 Q. B. D. 68, the plaintiff, a boy fourteen years of age, whose duty it was to assist a carman or van-driver to unload the van, was injured by two heavy iron window-frames falling upon him, which had been left unsecured

[1] Davis *v.* Western Ry., 104 Ala. 000; 18 So. Rep. 173.

in the van. At the time of the accident the plaintiff and the driver were unloading three window-frames, which were secured by two pieces of tarred string. The driver untied the string near the tail end of the van, and the plaintiff untied the other string at the front of the van. The plaintiff testified that the driver gave him no order to untie the string upon this occasion, but that he had done so on other occasions, and that the driver saw him untie it upon this occasion and made no objection. The driver then pulled away one of the frames without securing the other two, and immediately afterwards the two remaining frames fell upon the plaintiff. In an action under this clause of the act it was held that the evidence would warrant a finding that the injury was caused by the negligence of a person to whose orders the plaintiff was bound to conform and did conform, and that the injury resulted from having so conformed, and that the common employer was liable.

In Wild *v.* Waygood, [1892] 1 Q. B. 783, the Court of Appeal held that the plaintiff was entitled to go to the jury, and that the defendant was liable under sub-section 3 of section 1 of the English act of 1880, and that the plaintiff's injury was the result of conforming to the orders of one Duplea. Duplea and the plaintiff, while in the employ of the defendant, were engaged in constructing a lift in a house, and during the course of the work Duplea ordered the plaintiff to put a plank across the well of the lift and to stand upon it. The plaintiff did so, and while he was standing on the plank Duplea pulled the rope which started the lift, causing one end of the plank to fall, and the plaintiff, to save

himself from falling down the well, caught hold of another rope, which pulled him up to the pulley and caused the injuries complained of. The defendant contended that the injury was not caused by conforming to the order of Duplea, and the lower court so decided; but the Court of Appeal reversed this judgment. Lindley, L. J., says on pages 793, 794: "What was it that produced the injury to the plaintiff? It was the joint effect of the plaintiff being on the plank and the carelessness of Duplea in pulling the string. Those two things are so connected that it is impossible to say that the injury was not caused by these two things, viz., negligence of the person giving the order, and conformity with the order. Under this state of things I think the section plainly applies, and I cannot help thinking that the Divisional Court would have had no difficulty if it had not been for the last part of Lord Coleridge's judgment in Howard *v.* Bennett, 58 L. J. (Q. B.) 129; 60 L. T. 152. The decision of that case seems to be right enough, but that which is contained in the last part of Lord Coleridge's judgment I must say I cannot agree to."

In Howard *v.* Bennett, 58 L. J. (Q. B.) 129, it was held that the plaintiff was not entitled to a verdict, because the person to whose order he conformed was not a person to whose order he was bound to conform. The plaintiff worked on a calico-printing machine as a back-tenter, and one Dean worked on the same machine as a printer. The machine required two men to work it, and there were eleven such machines in the room, under a foreman. The plaintiff's duty was to keep the calico straight as it passed through the machine. Dean

stood at the opposite end of the machine, and it was one of his duties to start it. At the time of the accident, Dean told the plaintiff to clean the blanket which went over the cylinder, and while the plaintiff was so engaged, with his fingers between the rollers and the cylinder, Dean, without warning, started the machine, and the plaintiff's fingers were cut off. It was held that Dean was merely a fellow-workman, for whose negligence the common employer was not liable under the act.

III.

§ 93. *Injury to Employee of Independent Contractor.*

The fourth section of the Massachusetts Employers' Liability Act reads as follows: —

"Section 4. Whenever an employer enters into a contract, either written or verbal, with an independent contractor to do part of such employer's work, or whenever such contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or sub-contract shall not bar the liability of the employer for injuries to the employees of such contractor or sub-contractor, by reason of any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer, or furnished by him, and if such defect arose, or had not been discovered or remedied, through the negligence of the employer or some person entrusted by him with the duty of seeing that they were in proper condition."

Section 3 of the Colorado act contains a like provision.

The statutes of England, of Alabama, and of Indiana do not give the employee of an independent contractor any remedy against the person who employs the independent contractor. Nor does the common law of these jurisdictions confer a right of action against such person for personal injuries caused to such employee.[1]

The purpose of section 4 of the Massachusetts act of 1887, ch. 270, relating to independent contractors, is "to enlarge the liability of the employer; otherwise it is meaningless. The inference from the section plainly is that the employer should be liable when a contractor does part of his work and an employee of the contractor is injured by reason of a defect in the condition of the ways, works, machinery, or plant furnished by the employer to the contractor, which has not been discovered or remedied through the negligence of the employer, or of some person entrusted by him with the duty of seeing that they were in proper condition." [2]

Independent of statute the rule is firmly established at common law that an employee of an independent contractor cannot recover of the person employing such contractor for a personal injury caused by the negligence of the contractor or of his employees.[3]

[1] Scarborough *v.* Alabama Midland Ry., 94 Ala. 497; Rome &c. Ry. *v.* Chasteen, 88 Ala. 591; Vincennes Water Co. *v.* White, 124 Ind. 376; Johnson *v.* Lindsay, 23 Q. B. D. 508; s. c., [1891] A. C. 371; Cameron *v.* Nystrom, [1893] A. C. 308.

[2] Per Morton, J., for the court in Toomey *v.* Donovan, 158 Mass. 232, 236.

[3] Harkins *v.* Standard Sugar Refinery, 122 Mass. 400; Kansas Central Ry. *v.* Fitzsimmons, 18 Kans. 34; Knight *v.* Fox, 5 Exch. 721; Kelly *v.* New York, 11 N. Y. 432; Boswell *v.* Laird, 8 Cal. 469; Rome &c. Ry. *v.* Chasteen, 88 Ala. 591; Scarborough *v.* Alabama Midland Ry., 94 Ala. 497; McCafferty *v.* Spuyten Duyvil &c. Ry., 61 N. Y. 178; Vincennes Water Co. *v.* White, 124 Ind. 376; Hughes *v.* Cincinnati &c. Ry., 39 Ohio St. 461.

§ 94. *Same. Contractor may act in Another Capacity.*

The same person may act both in the capacity of an independent contractor and of a person entrusted by the employer with the duty of seeing that the ways, works, machinery, or plant owned or furnished by the employer are in proper condition. The two capacities are not inconsistent. "One person may sustain different relations to another, as well as different relations to different persons." If the person entrusted with this duty by the employer is negligent in its discharge, the employer is not relieved of liability by proof that such person is also an independent contractor, or sub-contractor, who hired the plaintiff and had power to discharge him and to control his work.[1]

[1] Toomey *v.* Donovan, 158 Mass. 232, 236.

CHAPTER VII.

ATTRIBUTES PECULIAR TO INJURIES RESULTING IN DEATH.

Section
95. Scope of chapter.
96. No action for death at common law. Early statutes.
97. Survival of action when the death is not instantaneous, or is preceded by conscious suffering.
98. Release by widow or next of kin.
99. Survival of action when death is instantaneous or without conscious suffering.
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111. Who are "dependent" upon the employee.
112. Action by dependent in Massachusetts.

§ 95. *Scope of Chapter.*

This chapter treats (1) of the survival of actions; (2) of the proper person to bring suit when the employee dies before action brought; (3) of what persons are entitled to the proceeds of the suit, if any; (4) of the release of damages; (5) whether a claim for damages under the act is ground for granting administration; (6) who are "dependents" within the terms

of the statute. It relates to certain attributes which are peculiar to injuries resulting in death.

§ 96. *No Action for Death at Common Law. Early Statutes.*

Irrespective of statute, no action can be maintained for a personal injury resulting in death, whether the death is caused by the negligence of an employer or any one else. At common law, the death of a human being was not considered a proper ground of an action for damages.[1]

A like rule applies in the admiralty courts; and it is well settled that, in the absence of an Act of Congress or of a state statute giving a right of action for the negligent killing of a human being on the high seas or on waters navigable from the sea, no suit can be maintained in admiralty therefor.[2]

This rule of the common law has been modified or changed by statute in England and in nearly all the States. In the case of Insurance Co. *v.* Brame, 95 U. S. 754, 759, Mr. Justice Hunt says for the court: "By the common law, actions for injury to the person

[1] Carey *v.* Berkshire Ry., 1 Cush. (Mass.) 475; Connecticut Mut. Ins. Co. *v.* New York &c. Ry., 25 Conn. 265; Eden *v.* Lexington &c. Ry., 14 B. Monroe (Ky.), 204; Worley *v.* Cincinnati &c. Ry., 1 Handy (Ohio), 481; Hubgh *v.* New Orleans &c. Ry., 6 La. Ann. 495; Hermann *v.* Carrollton Ry., 11 La. Ann. 5; Green *v.* Hudson River Ry., 2 Keyes (N. Y.), 294; Kramer *v.* Market Street Ry., 25 Cal. 434; Indianapolis &c. Ry. *v.* Keely, 23 Ind. 133; Hyatt *v.* Adams, 16 Mich. 180; Stewart *v.* Louisville &c. Ry., 83 Ala. 493, 495; Harris *v.* McNamara, 97 Ala. 181, 182; Grosso *v.* Delaware &c. Ry., 50 N. J. L. 317; Insurance Co. *v.* Brame, 95 U. S. 754; The Harrisburg, 119 U. S. 199; Baker *v.* Bolton, 1 Camp. 493. *Contra*, James *v.* Christy, 18 Mo. 162; Shields *v.* Yonge, 15 Ga. 349; McDowell *v.* Georgia Ry., 60 Ga. 320.

[2] The Harrisburg, 119 U. S. 199; The Alaska, 130 U. S. 201.

abate by death, and cannot be revived or maintained by the executor or the heir. By the Act of Parliament of August 21, 1846, 9 & 10 Vict.,[1] an action in certain cases is given to the representatives of the deceased. This principle, in various forms and with various limitations, has been incorporated into the statutes of many of our States."

Under the Massachusetts statute of 1842, providing that "the action of trespass on the case for damage to the person shall hereafter survive," it has been held that the executor or administrator of a person negligently killed by the defendant may maintain an action therefor when the death was not instantaneous,[2] but could not maintain such an action when the death was instantaneous,[3] for the reason that the statute supposes the deceased to have been once entitled to an action himself.

The fact that the deceased remained in an unconscious condition from the time of his injury to his death does not prevent a recovery by his executor or administrator, under the act of 1842, if the death was not instantaneous. No damages can be recovered for his physical or mental suffering, as he is deemed to have had none during his unconsciousness; but damages may be recovered for the expenses of illness and loss incurred before death by reason of the negligence.[4]

When the survival of an action to the executor or

[1] Known as Lord Campbell's Act, being cap. 93 of 9 & 10 Victoria.

[2] Hollenbeck *v.* Berkshire Ry., 9 Cush. 478; Bancroft *v.* Boston &c. Ry., 11 Allen, 34.

[3] Kearney *v.* Boston &c. Ry., 9 Cush. 108; Moran *v.* Hollings, 125 Mass. 93.

[4] Bancroft *v.* Boston &c. Ry., 11 Allen, 34.

administrator depends upon the fact that the death was not instantaneous, the burden of proving that fact rests upon the plaintiff.[1]

§ 97. *Survival of Action when the Death is not Instantaneous, or is preceded by Conscious Suffering.*

The various Employers' Liability Acts change the rule of the common law relating to the survival of actions, and provide that the right of action given thereby shall survive to the personal representative of the deceased employee, or to some member of his family.

The Massachusetts act recognizes two kinds of death, and attaches different consequences to them. The first section relates to a death which is not instantaneous, or is preceded by conscious suffering,[2] and reads as follows: —

"In case the injury results in death, the legal representatives of such employee shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of nor in the service of the employer, nor engaged in its work."

The above section of the original act was amended by the act of 1892, ch. 260, § 1, by adding the following words: —

"And in case such death is not instantaneous, or is preceded by conscious suffering, said legal representatives may, in the action brought under this section, except as hereinafter provided, also recover damages for such death. The total damages awarded hereunder,

[1] Corcoran *v.* Boston & Albany Ry., 133 Mass. 507; Riley *v.* Connecticut River Ry., 135 Mass. 292.

[2] Daly *v.* New Jersey Steel Co., 155 Mass. 1, 3.

both for said death and said injury, shall not exceed five thousand dollars, and shall be apportioned by the jury between the legal representatives and the persons, if any, entitled under the succeeding section of this act to bring an action for instantaneous death. If there are no such persons, then no damages for such death shall be recovered, and the damages, so far as the same are awarded for said death, shall be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable."

The effect of these two sections is to empower the "legal representatives" of the deceased employee to sue and recover damages for the conscious suffering of the deceased from the time of the injury to his death; and also, if he left a widow, or dependent next of kin, to recover damages for such death as a substantive cause of action. Under the original act of 1887, a death preceded by conscious suffering was not a substantive cause of action, and the executor or administrator could not recover damages for such death itself, but could recover only for his conscious suffering.[1] The amendment of 1892, therefore, increases the liability of the employer.

Under these sections the damages recovered for the conscious suffering of the deceased seem to constitute assets of his estate, and are therefore subject to the claims of his creditors, and to the operation of his will. The damages recovered for the death itself, however, seem to form no part of the assets of the estate, but

[1] Ramsdell *v.* New York &c. Ry., 151 Mass. 245; Clark *v.* New York &c. Ry., 160 Mass. 39.

to belong to the widow, or dependent next of kin, as being the persons entitled under the succeeding sections of the act. Even in this case, however, the action must be brought in the name of the personal representative.

§ 98. *Release by Widow or Next of Kin.*

Has the widow or dependent next of kin the power to give a release of all demands, which will bar a recovery under the above sections of the Massachusetts act?

Under the Minnesota act, giving a right of action to the personal representative of a person killed by negligence, for the benefit of the widow and next of kin, it has been decided that, where the deceased leaves no widow, a release given by the next of kin will bar an action by the administrator.[1]

Under a like statute of Nebraska, a release given by the widow before her appointment as administratrix has been held to bar her right to recover damages for herself, but not for the children, as next of kin.[2]

Under the New York statute, giving a right of action to the executor or administrator for the benefit of the widow, husband, and next of kin of one killed by the wrongful act, neglect, or default of the defendant, it has been held that a release signed by a brother-in-law before his appointment as administrator was no bar to an action for the death brought after his appointment; but that if the money received was expended

[1] Sykora *v.* Case Threshing Machine Co., 58 Minn. 000; s. c., 60 N. W. Rep. 1008.

[2] Chicago &c. Ry. *v.* Wymore, 40 Neb. 645; 58 N. W. Rep. 1120.

for the expenses of funeral and burial, the defendant was entitled to credit therefor.[1]

For cases relating to the right of an employee himself to waive the benefit of the Employers' Liability Act by contract or agreement made before his injury is received, and the effect of such a contract upon his widow or next of kin in case he is killed, see §§ 6 and 7, *ante*.

§ 99. *Survival of Action when Death is Instantaneous or without Conscious Suffering.*

The second section of the Massachusetts act of 1887 relates to the case of an employee who is "instantly killed or dies without conscious suffering," and reads as follows: —

"Section 2. Where an employee is instantly killed, or dies without conscious suffering, as the result of the negligence of an employer, or of the negligence of any person for whose negligence the employer is liable under the provisions of this act, the widow of the deceased, or, in case there is no widow, the next of kin (provided that such next of kin were, at the time of the death of such employee, dependent upon the wages of such employee for support) may maintain an action for damages therefor, and may recover in the same manner, to the same extent, as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered."

Damages recovered under this section are no part of the assets of the estate of the deceased. They are not subject to the operation of his will, nor can they be

[1] Stuber *v.* McEntee, 142 N. Y. 200.

taken in payment for his debts. They belong exclusively to the widow, or, if there is no widow, to the dependent next of kin.

The American statutes corresponding to Lord Campbell's Act have been uniformly construed in this way. Even when the statute declares that the action shall be brought in the name of the personal representative of the deceased, the damages constitute no part of his estate, if the statute declares that they shall inure to the benefit of the widow or next of kin.[1]

Speaking of similar statutory provisions of Connecticut, Mr. Justice Barker says for the court in Higgins *v.* Central New England Ry., 155 Mass. 176, 181: "The effect of such provisions as to the distribution of the damages is to say that they shall not be assets for the payment of debts, and shall not pass by the will of the deceased, but shall be applied to the compensation of the persons who are presumed to have suffered the most by the death of the person injured."

§ 100. *Where Employee who has consciously suffered leaves no Widow or Dependent Next of Kin.*

In such case the Massachusetts act, as amended by the act of 1892, ch. 260, § 1, expressly provides that "no damages for such death shall be recovered." The theory of the statute is that an employee's widow, or his dependent next of kin, has such an interest in his life as to render the employer liable in damages to either the widow or such next of kin for negligence causing his death. But if the employee leaves neither a widow nor dependent next of kin, then there is no

[1] Stuber *v.* McEntee, 142 N. Y. 200.

person who has such an interest in his life as equitably to entitle him to a right of action against the employer for the death itself. The administrator, however, may maintain an action for the conscious suffering of the deceased.[1]

Where a statute of this kind gives a right of action to the personal representative of the deceased for the exclusive benefit of the widow or next of kin, no action can be maintained if such persons do not exist, even if the statute omits to declare that no damages shall be recoverable in such case.[2] The burden is also upon the plaintiff to show that the deceased left a widow or next of kin.

Under the Alabama Employers' Liability Act, however, which provides that the damages recovered by the personal representative of the deceased employee "shall be distributed according to the statute of distributions," it has been decided that the executor or administrator need not allege that the deceased left any heirs at law or next of kin, as that is a matter of defence, and, in the absence of evidence to the contrary, it will be presumed that he left such heirs or next of kin.[3] It seems, also, that the executor or administrator may recover nominal damages even when the proof shows that the deceased left no heirs or next of kin.[4]

[1] *Ante*, § 97.

[2] Commonwealth *v.* Eastern Ry., 5 Gray, 473 ; Indianapolis &c. Ry. *v.* Keely, 23 Ind. 133 ; Chicago &c. Ry. *v.* Morris, 26 Ill. 400 ; State *v.* Gilmore, 4 Foster (N. H.), 461 ; Lyons *v.* Cleveland &c. Ry., 7 Ohio St. 336 ; Lucas *v.* New York &c. Ry., 21 Barb. (N. Y.) 245.

[3] James *v.* Richmond &c. Ry., 92 Ala. 231 ; Columbus &c. Ry. *v.* Bradford, 86 Ala. 574.

[4] James *v.* Richmond &c. Ry., 92 Ala. 231.

§ 101. *What constitutes Instantaneous Death, or Death without Conscious Suffering.*

Where a brakeman is knocked from the top of a freight-car by a bridge, evidence that the speed of the train was about twenty miles an hour, and the lesions upon his head were sufficient to produce instant death, and that the defendant's workmen who picked up the dead body were not called as witnesses, will justify the jury in finding that he died instantly, or without conscious suffering.[1]

In Mears *v.* Boston & Maine Ry., 163 Mass. 150, the plaintiff's husband, a car-inspector in the defendant's employ, was crushed by a car while in the performance of his duty. The testimony tended to show that his body was crushed, and one witness, who was near him at the time, stated that he was "stone-dead" when the witness reached him, though the same witness also testified that the deceased took two or three steps after he was struck and then fell. In this action under the statute by his widow, it was held that the evidence would warrant a finding that he died without conscious suffering.

Where, however, the proof leaves to conjecture whether the deceased regained consciousness or not, the next of kin cannot recover, as the burden is upon the plaintiff to prove that he died instantly, or without conscious suffering. Thus, in Hodnett *v.* Boston & Albany Ry., 156 Mass. 86, an employee was killed by being struck on the back of the head by the end sill of a dump-car going ten or twelve miles an hour, and

[1] Maher *v.* Boston & Albany Ry., 158 Mass. 36.

bounced against a stationary car. The blood gushed from his mouth and nose in streams; he was apparently unconscious when picked up, and he was injured at 11 A. M. and died at 1 P. M. There was no evidence that from the nature of his injuries he was unlikely to regain consciousness. It was held that the evidence was not sufficient to warrant a finding that the employee died without conscious suffering.

§ 102. *Concurring Causes of Death, for One of which Defendant is not culpable.*

Where the negligent act, for which the defendant is liable under the Employers' Liability Act, is a sufficient cause to produce death, the defendant cannot escape liability by proof that there was another subsequent cause which was also sufficient to produce death, for which he was not responsible.

In Thompson *v.* Louisville Ry., 91 Ala. 496, a brakeman, while working on a hand-car under the charge or control of one McPherson, was injured through the negligence of McPherson in attempting to stop the car by using a shingle. His attending physicians testified that the injury so received was mortal, and would have produced death without any other cause. A few days after this injury, however, his wife, by mistake, administered to him internally several grains of the poison corrosive sublimate, which the physician had prescribed as a wash for his wounds. Other physicians testified that the wounds were not necessarily fatal, but that they accelerated his death from the effects of the poison. The poison was the immediate cause of the death. It was held that a charge to the jury to find

for the defendant if they believed that the deceased died from the effects of the poison, though the death was accelerated by his injuries, was erroneous, for the reason that the defendant could not shelter itself under the plea of a new intervening cause when its own wrongful act was the original and sufficient cause thereof.[1]

§ 103. *Claim for Damages as Ground for Administration.*

Where the statute of the State of injury and of process requires an action for the negligent killing of a human being to be brought in the name of the personal representative of the deceased, such claim for damages is sufficient property, estate, or assets to authorize the grant of administration in the State of injury, if the deceased was a resident of that State. When the deceased was a non-resident of that State, there is some conflict of opinion; but the better rule seems to be that even in such case the claim for damages will authorize the grant of administration in the State of injury, at least after administration has been obtained at the domicil of the deceased.

In Hartford &c. Ry. *v.* Andrews, 36 Conn. 213, it was held that an administrator appointed at the domicil of the deceased (Maine) was entitled as a matter of right to be appointed ancillary administrator in Connecticut for the purpose of prosecuting a suit for damages for his negligent killing in Connecticut, and that such claim for damages was sufficient to authorize his appointment. The court says that the claim, if valid,

[1] See, also, Sauter *v.* New York Central Ry., 66 N. Y. 50.

is property within the meaning of the statute. "It was not the province of the court of probate to pass upon the validity of the claim; it was enough for that court to be satisfied that there was an apparent claim, and a *bona fide* intention to pursue it, and that administration was necessary to its pursuit."[1]

A contrary decision, however, has been made in the Kansas case of Perry *v.* St. Joseph &c. Ry., 29 Kans. 420. In that case a non-resident of Kansas was killed in that State through the negligence of the defendant railroad company. Section 422 of the Kansas Code gave a right of action to the personal representative of the deceased for the benefit of the widow and children, if any, or the next of kin. The plaintiff was appointed administrator in Kansas, upon the ground that this claim for damages was "estate" of the deceased within the State of Kansas. In this action for damages it was held (1) that the claim for damages was not "estate" within the meaning of the statute authorizing the grant of administration upon the estate of a non-resident; (2) that the probate court was therefore without jurisdiction;[2] (3) that its decree was void, and could be impeached collaterally in this action; and that the plaintiff could not recover.

The Indiana statute gave a right of action to the personal representative of a person killed by the wrongful act or omission of another, and declared that the damages "must inure to the exclusive benefit of the widow and children, if any, or next of kin" of the

[1] Per Butler, J., for the court, p. 215.

[2] See, also, Mallory *v.* Burlington &c. Ry., 53 Kans. 557; 36 Pac. Rep. 1059.

deceased. One Swayne, a citizen of Pennsylvania, was killed in a railroad accident in Indiana, and his administrator appointed in Indiana brought an action against the railroad. The railroad company then petitioned the probate court to revoke the letters of administration. Swayne left no assets in Indiana, unless this claim for damages was such. On appeal from the probate decree, it was held that the claim for damages was not assets for founding administration on the estate of a non-resident; that the probate court had no jurisdiction, and that the letters should therefore be revoked.[1] In the opinion of the court, delivered by Mr. Justice Elliott, it is said on pages 484, 485 : —

"The right of action created by the statute is founded on a new grievance, namely, causing the death, and is for the injury sustained thereby by the widow and children or next of kin of the deceased, for the damages must inure to their exclusive benefit. They are recovered in the name of the personal representative of the deceased, but do not become assets of the estate. The relation of the administrator to the fund, when recovered, is not that of the representative of the deceased, but of a trustee for the benefit of the widow and next of kin. The action is for their exclusive benefit, and if no such person existed it could not be maintained."

§ 104. *Same.*

When the person killed was neither injured nor domiciled in the State granting the letters of administration, the authorities are also conflicting. In Iowa it has been held that a claim for damages under the Illi-

[1] Jeffersonville Ry. *v.* Swayne, 26 Ind. 477.

nois act for the negligent killing in Illinois of a resident of Illinois would authorize a probate court of Iowa to grant letters of administration, on the ground that an action for such death could be maintained in Iowa.[1] It was accordingly held that the Iowa administrator could maintain an action in Iowa against the employer of the deceased, the railroad company, for such killing in Illinois, as the Illinois statute gave a right of action for such death, and it was not contrary to the public policy of Iowa. Upon the main proposition the court, by Mr. Justice Rothrock, says on page 728: —

"The argument [of defendant] is based upon the claim that the deceased left no estate within this State to be administered upon; that whatever claim existed against the defendant for damages for the death of Quigley arose under the law of Illinois, where the injury was received, and where the death occurred; and that by the law of that State a right of action was not in the estate, but in the wife, husband, or next of kin, if there were any surviving. If it be correct, as claimed by appellant, that no right of action existed in this State, it is probably true that there was no estate upon which to administer. But if an action may be maintained in this State by an administrator, we think it necessarily follows that the circuit court had jurisdiction to make the appointment, and it is immaterial in such case whether the decedent was a resident of the State of Illinois or of this State. The power to appoint an administrator in this State, for the sole purpose of collecting a claim due to the decedent, has been too long authorized and recognized to be now questioned."

[1] Morris *v.* Chicago &c. Ry., 65 Iowa, 727.

In New York, under its statutes relating to the probate or surrogate's court, letters of administration granted by the surrogate are deemed conclusive evidence that the deceased left assets within the county, and the administrator's right to sue cannot be defeated by proof that the deceased was injured in another State (Connecticut) and left no assets in New York.[1] The reasoning of the New York court in the case cited is broad enough to apply to the case of a non-resident of New York, and the principal case cited by the court (Roderigas *v.* East River Sav. Inst., 63 N. Y. 460) was that of a non-resident.

The Supreme Court of Illinois has decided the contrary, as applied to an Illinois corporation, where the negligent act was committed by such corporation. In Illinois Central Ry. *v.* Cragin, 71 Ill. 177, a resident of Illinois was killed in Illinois by the negligence of an Illinois corporation, for which the Illinois statute gave a right of action. The deceased left no property in Iowa, unless this claim for damages could be considered

[1] Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48.

There are some limits, however, to the doctrine of the conclusiveness of the appointment of an administrator. A fundamental want of jurisdiction may be shown in a collateral proceeding. Thus a state statute, authorizing administration upon the estate of a person who has been absent and unheard of for seven years, is contrary to due process of law and void as applied to a living person; and the decree of appointment is also void, and may be impeached by him in a collateral proceeding to recover property conveyed by the administrator to a *bona fide* purchaser for value. This is a question of federal law, and the United States Supreme Court has jurisdiction to review and to reverse a state judgment to the contrary. Scott *v.* McNeal, 154 U. S. 34, reversing Scott *v.* McNeal, 5 Wash. St. 309, and virtually overruling Roderigas *v.* East River Sav. Inst., 63 N. Y. 460. See, also, Lavin *v.* Emigrant Industrial Sav. Bk., 18 Blatch. 1.

as situated in Iowa. The plaintiff Cragin, however, obtained letters of administration in Iowa, and brought this suit thereon in Illinois against the railroad company. It was held that the action could not be maintained, chiefly on the ground that, as the defendant was a corporation of Illinois, no cause of action existed against it in Iowa. The court conceded that the case might be different as applied to individuals.

§ 105. *Who may sue when Employee dies before Action is brought.*

The Alabama Employers' Liability Act provides that the "personal representative" of the deceased employee may maintain an action against the employer. Under this statute it has been held that the executor or administrator of the deceased employee is the only proper person to bring suit,[1] but that if the deceased was a minor child, he could not recover for the time of the minority of the deceased, if his father or mother was alive and was entitled to receive his wages.[2]

The Alabama statute, as originally enacted in 1885 (Sess. Acts 1884–85, p. 115), provided that the "heirs at law" of the deceased employee should have the same right of compensation and remedies against the employer, as if the workman had not been in his service nor engaged in his work. In Stewart *v.* Louisville &c. Ry., 83 Ala. 493, it was also held under this act that the personal representative was the only person who

[1] Columbus &c. Ry. *v.* Bradford, 86 Ala. 574; Lovell *v.* De Bardelaben Coal Co., 90 Ala. 13; Tennessee Coal Co. *v.* Herndon, 100 Ala. 451.

[2] Williams *v.* South & North Alabama Ry., 91 Ala. 635; Alabama Coal Co. *v.* Pitts, 98 Ala. 285.

could maintain an action, and that an action brought by two brothers of the deceased, who were his next of kin, could not be maintained.

In statutes of a like nature, the words "personal representative" have also been held to mean the executor or administrator of the person killed by a negligent act.[1] When the statute provides that the action may or shall be brought in the name of the personal representative, no one else can maintain an action, not even the widow, or other person entitled to receive the damages.[2]

Under the Alabama Employers' Liability Act, a father cannot sue for an injury to his minor son resulting in death: the personal representative is the only person who can sue. The father has no standing in court to recover damages against the employer under that statute.[3] In delivering the opinion of the court in the case just cited, Mr. Justice McClellan says, on page 18: "In creating this new cause of action, it was, therefore, not only entirely competent for the legislature to confine it, in cases where the injury produced death, to the personal representative, but, in doing so, no existing right to sue was taken away from the parents. If the minor's employment was against the will of the father, he could maintain an action before the 'Employers' Act,' and afterwards, though not under it. If with his consent, as in this case, he could sue neither before or after, nor under or without the statute, if we are to

[1] McCarty *v.* New York &c. Ry., 62 Fed. Rep. 437; Perry *v.* St. Joseph &c. Ry., 29 Kans. 420.

[2] Selma &c. Ry. *v.* Lacy, 49 Ga. 106; Monaghan *v.* Horn, 7 Canada Sup. Ct. 409; Stewart *v.* Louisville &c. Ry., 83 Ala. 493.

[3] Lovell *v.* De Bardelaben Coal Co., 90 Ala. 13.

give any force whatever to section 2591, which designates the only person who may sue under the act, where the injury results in death, and particularly and peremptorily makes provision for the disposition of the recovery, which can only be carried out by the personal representative."

§ 106. *Same.*

The Massachusetts act declares that in certain cases the "legal representatives," and in other cases that the widow of the deceased, or, if no widow, the dependent next of kin, may maintain an action under the statute against the employer. This question is explained in the preceding sections of this chapter. The term "legal representative" means the executor or administrator of the deceased employee.

In England it has been decided under Lord Campbell's Act that a husband, who has lived apart from his wife for years, cannot recover under that statute, on the ground that by such conduct he loses his right to claim the benefit of the act.[1] Nor can a wife who is living in adultery apart from her husband recover under this statute.[2]

In the United States, however, it has been held that the fact that husband and wife separated by mutual consent, and each married another person before the husband was killed by the wrongful act of the defendant, does not prevent the wife from maintaining an action for such death, under a statute like Lord Campbell's Act.[3]

[1] Harrison *v.* London &c. Ry., Times Law Rep., vol. i., p. 519.

[2] Stimpson *v.* Wood, 57 L. J. Q. B. 484.

[3] Thomas *v.* East Tennessee &c. Ry., 63 Fed. Rep. 420.

In Savannah &c. Ry. *v.* Smith, 93 Ga. 742; s. c., 21 S. E. Rep. 157, it was held that the mother of a minor child who has been abandoned by her husband, and has supported the child, may maintain an action for the killing of the child, by wrongful act, notwithstanding the father is alive.

Under the Revised Statutes of Indiana of 1894, § 267, providing that a father may maintain an action for the death of a child by the defendant's wrongful act or negligence, a man who marries the mother of a bastard child, and takes him into his home as a member of the family, cannot sue for the child's death.[1]

A child *en ventre sa mère* may recover under such statutes.[2]

A bastard cannot recover under Lord Campbell's Act.[3]

§ 107. *Former Suit or Judgment by Wrong Person No Bar to Suit by Right Person.*

Where the Employers' Liability Act gives the right of action to the "personal representative" of the deceased employee, as in Alabama, it has been decided that a suit by any one else is no bar to another suit on the same cause of action by the executor or administrator of the deceased.[4] A like principle applies also to a former suit brought by any person other than the person specified in the statute, or to a former judgment rendered in a suit brought by such person.

[1] Thornburg *v.* American Strawboard Co., 141 Ind. 000; s. c., 40 N. E. Rep. 1062.

[2] The George and Richard, 24 L. T. (N. S.) 717; Nelson *v.* Galveston &c. Ry., 78 Tex. 621.

[3] Dickinson *v.* North Eastern Ry., 2 H. & C. 735.

[4] Tennessee Coal Co. *v.* Herndon, 100 Ala. 451.

§ 108. *Domestic Administrator's Right to sue for Injury received in Another State.*

In the federal courts the rule is now settled that an administrator appointed in the State of domicil may sue in that State under a statute of another State in which the injury was received. The fact that the deceased had no right of action for the injury himself, or that the statute creating the right gave it to the personal representative for the benefit of the widow and next of kin, does not defeat his right of recovery.[1] This is a question of general law or jurisprudence upon which the federal courts are not bound by the law or practice of the courts of the State in which they sit.[2]

In New York it has been held that an administrator appointed in New York may sue therein for an injury received in Connecticut without showing that administration had been taken out in Connecticut.[3]

In Massachusetts a distinction has been drawn between actions which survive and those which do not survive. When the statute of the State of injury gives a right of action to the injured person, and provides that it shall survive to his personal representative for the benefit of his widow, etc., it has been held that an administrator appointed in Massachusetts, the place of domicil, may maintain an action there for an injury received in Connecticut.[4] But when the statute of the

[1] Dennick *v.* Railroad Co., 103 U. S. 11.
[2] Dennick *v.* Railroad Co., 103 U. S. 11.
[3] Leonard *v.* Columbia Nav. Co., 84 N. Y. 48.
[4] Higgins *v.* Central New England Ry., 155 Mass. 176.

State of injury failed to provide for the survival of the action, it was held that a Massachusetts administrator could not maintain an action in that State.[1] This decision was placed upon the ground that the right of a Massachusetts administrator to sue in that State was confined to causes of action which accrued to the intestate during his lifetime, or which grew out of his rights of property or those of his creditors; and that a specific power to sue created by the statute of another State could not be imparted to a Massachusetts administrator, so as to give him the right to sue in Massachusetts.

In Ohio and in Kansas it has also been decided that a domestic administrator, appointed at the domicil of the deceased, could not sue under a statute of another State in which the injury was received.[2]

It has also been held in Massachusetts and in Kansas that the fact that the statute of the State of process provides that the right of action shall survive to the personal representative does not enable the domestic administrator to sue for an injury received in another State.[3]

§ 109. *Foreign Administrator's Right to sue.*

The general rule is well settled, both in the state and federal courts, that, in the absence of an enabling statute, an executor or administrator appointed in one State cannot sue in another State in his representative

[1] Richardson *v.* New York Central Ry., 98 Mass. 85; Davis *v.* New York &c. Ry., 143 Mass. 301.

[2] Woodard *v.* Michigan Southern Ry., 10 Ohio St. 121; McCarthy *v.* Chicago &c. Ry., 18 Kans. 46.

[3] Davis *v.* New York &c. Ry., 143 Mass. 301; McCarthy *v.* Chicago &c. Ry., 18 Kans. 46.

capacity. Unless the laws of the State of process allow a foreign administrator to prosecute a suit therein, he must take out ancillary administration before he can do so.[1]

Many States, however, have passed such enabling statutes. Thus, in Indiana, the statute provides that a foreign administrator may sue "in like manner and under like restrictions as a resident administrator;" and it has been held that an administrator appointed in another State may sue in Indiana, for an injury there received resulting in death, under the Indiana statutes giving a right of action therefor.[2] So, under the Georgia enabling act, it has been decided that an executor or administrator appointed in South Carolina may sue in Georgia, upon complying with certain conditions prescribed by the Code, for a death caused by negligence in South Carolina.[3]

Where the statute of a State in which an injury resulting in death is received gives a right of action to the personal representative of the deceased for the exclusive benefit of the widow and next of kin, an administrator appointed in that State may sue in another State without taking out ancillary letters; because the amount recoverable is no part of the assets of the estate, but belongs to the widow and next of kin.[4] The relation of the administrator to the damages, when recovered, is not that of the representative of the

[1] Noonan *v.* Bradley, 9 Wall. 394; Lawrence *v.* Nelson, 143 U. S. 215; Langdon *v.* Potter, 11 Mass. 313; Chapman *v.* Fish, 6 Hill (N. Y.), 554; Bell *v.* Nichols, 38 Ala. 678; Gilman *v.* Gilman, 54 Me. 453.

[2] Jeffersonville &c. Ry. *v.* Hendricks, 41 Ind. 48.

[3] South Carolina Ry. *v.* Nix, 68 Ga. 572.

[4] McCarty *v.* New York &c. Ry., 62 Fed. Rep. 437.

deceased, but that of an agent or trustee for the benefit of the widow and next of kin.[1]

In Kansas Pacific Ry. *v.* Cutter, 16 Kans. 568, a similar decision was placed partly on the ground that the term "personal representative" included a foreign administrator, and partly on the ground that the damages recovered were not assets of the estate for the payment of debts, but belonged exclusively to the widow and children, if any, or next of kin.[2]

In Limekiller *v.* Hannibal &c. Ry., 33 Kans. 83, a resident of Missouri was killed in Kansas. The plaintiff was appointed administratrix in Missouri, and brought this action under § 422 of the Kansas Civil Code, which gave a right of action to the personal representative of a person killed by the wrongful act or omission of another, — the damages to inure to the exclusive benefit of the widow and children, if any, or next of kin. In Missouri the personal representative had no power to institute such an action, but the husband or wife of the deceased had such power. It was held that the plaintiff could not maintain the action, for the reason that her powers or rights in Kansas could be no greater than they were in Missouri, the place of her appointment.

§ 110. *Same. Author's View.*

The true view seems to be to regard an administrator, appointed in a State having such a statutory

[1] Jeffersonville &c. Ry. *v.* Swayne, 26 Ind. 477, 484, 485; Perry *v.* St. Joseph &c. Ry., 29 Kans. 420, 422, 423; Wooden *v.* Western New York &c. Ry., 126 N. Y. 10, 15.

[2] See, also, Jeffersonville &c. Ry. *v.* Hendricks, 41 Ind. 48, 72.

trustee for the benefit of the widow or next of kin, and entitled to sue as such in another State without ancillary administration therein. He does not sue for the benefit of the estate, but for the benefit of the widow or next of kin. The same statute which creates the right of action designates the personal representative of the deceased as the proper person to bring the suit. The fact that he describes himself as executor or administrator of the deceased does not change the essential nature of the action: it is still an action for the benefit of the widow or next of kin, and he is merely the agent or trustee appointed to prosecute it, and to pay over the proceeds, if any, not to the creditors or legatees of the deceased, but to the widow or next of kin. His right or title to the proceeds is not derived from the deceased, but from the statute.

The case seems to be analogous to that of a person appointed, under a statute of the State creating a corporation, to hold the property of the corporation, after its dissolution, for the benefit of its creditors and stockholders and others interested in the assets. It has been held that such a statutory trustee or receiver may sue and be sued in the courts of another State without an appointment from the latter State, on the ground that a corporation is the creature of legislation, and may be endowed with such powers as its creator sees fit to give, and that such person is the legal representative of the corporation, and therefore entitled to recognition as such in other States, or in the federal courts sitting in other States.[1]

[1] Relfe *v.* Rundle, 103 U. S. 222; Parsons *v.* Charter Oak Ins. Co., 31 Fed. Rep. 305; Bockover *v.* Life Asso., 77 Va. 85. See, also, § 199, *post.*

This view receives support from the cases holding that a foreign administrator may sue when his suit is not brought in his representative capacity, but in his personal or some other capacity; as, payee of a note given in payment of property belonging to the estate,[1] or when he has reduced a debt due to the estate to judgment in the State of appointment.[2]

§ 111. *Who are "Dependent" upon the Employee.*

In Daly *v.* New Jersey Steel Co., 155 Mass. 1, it was held that an invalid sister of the employee, who was unable to work regularly or to earn sufficient to pay her doctor's bills, and who received from her brother thirty to thirty-five dollars a month on an average for three or four years, was dependent upon him for support within the meaning of the statute. This decision was placed upon the ground that it was not necessary that the person claiming as a dependent should be dependent in the sense that the employee was legally bound, if able, to support the claimant (Mass. Pub. Sts. ch. 84, § 6). The fact of dependence was held to be sufficient to bring the claimant within the benefit of the statute.[3]

Under statutes giving a right of action for the benefit of the widow and next of kin of the deceased, the damages to be awarded "with reference to the pecuniary injuries resulting from such death to the widow and next of kin," it has also been held that

[1] McCord *v.* Thompson, 92 Ind. 565.

[2] Talmage *v.* Chapel, 16 Mass. 71; Biddle *v.* Wilkins, 1 Peters, 686; Barton *v.* Higgins, 41 Md. 539; Lewis *v.* Adams, 70 Cal. 403; Cherry *v.* Speight, 28 Tex. 503. For other illustrations, see Doe *v.* M'Farland, 9 Cranch, 151; De Forest *v.* Thompson, 40 Fed. Rep. 375.

[3] See, also, Houlihan *v.* Connecticut River Ry., 164 Mass. 555.

a recovery may be had without proof that the beneficiary had a legal claim upon the deceased for support. To hold the contrary "would be an interpolation in the statute changing the fair import of its terms, and hence not warranted." [1]

In Hodnett *v.* Boston & Albany Ry., 156 Mass. 86, the claimant was the employee's half-sister. Her testimony was that he used to come in and see her, and sometimes gave her money; that he sent her money every other week or so to pay her rent; and that she had no means of support for herself and her two children but her earnings, and since his death she had had to support herself. There was no evidence to show what her earnings or living expenses were. It was held that such evidence would not warrant a jury in finding that the claimant was dependent upon the wages of the employee for support, and that she could not recover under the act.[2]

§ 112. *Action by Dependent in Massachusetts.*

Where the employee's death is instantaneous, the action should be brought in the name of the next of kin who is dependent upon the wages of such employee for support. If there are two next of kin, and only one of them is dependent, the action should be brought in his or her name alone, without joining the other.[3]

[1] Railroad Co. *v.* Barron, 5 Wall. 90, 106; Chicago *v.* Major, 18 Ill. 349; Pennsylvania Ry. *v.* McCloskey, 23 Pa. St. 526.

[2] As to who are or are not "dependent," see, further, McCarthy *v.* New England Order of Protection, 153 Mass. 314; American Legion of Honor *v.* Perry, 140 Mass. 580.

[3] Daly *v.* New Jersey Steel Co., 155 Mass. 1.

CHAPTER VIII.

CONTRIBUTORY NEGLIGENCE.

Section
113. Contributory negligence is a defence.
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§ 113. *Contributory Negligence is a Defence.*

It is well settled in the United States, and also in England, that the various Employers' Liability Acts have not abolished the defence of contributory negligence. If the injured employee is guilty of such negligence, he cannot recover under the act.[1] The Massachusetts and Colorado statutes confer the right of action in terms only upon an employee "who is himself in the exercise of due care and diligence at the time," while the English and Alabama statutes are silent upon the subject.

In Wilson *v.* Louisville &c. Ry., 85 Ala. 269, a

[1] Geyette *v.* Fitchburg Ry., 162 Mass. 549; Brown *v.* New York &c. Ry., 158 Mass. 247; Mobile &c. Ry. *v.* Holborn, 84 Ala. 133; Columbus &c. Ry. *v.* Bradford, 86 Ala. 574; Richmond &c. Ry. *v.* Thomason, 99 Ala. 471; Weblin *v.* Ballard, 17 Q. B. D. 122.

freight brakeman, while descending from the top of the caboose by a side ladder, was struck by the supply-pipe of a water-tank near the track and injured. The tank was so near the track as not to leave sufficient space between the pipe and a train of cars for the body of a person. The plaintiff had been in the employ of the defendant road for two or three months, and was acquainted with the location and the surroundings of the tank. The accident occurred at three o'clock in the morning, and the plaintiff did not have his lantern with him. He was not descending to discharge a duty required by the nature of his employment, but merely for the purpose of eating his lunch. In an action under the Alabama statute, it was held that the plaintiff was guilty of contributory negligence and could not recover.

In Columbus &c. Ry. *v.* Bridges, 86 Ala. 448, an engineer of a construction train, who was also acting as conductor, was killed by the falling of a bridge while attempting to take his train across a river during a great flood. The evidence tended to show that the watchman at the bridge gave the safety signal, and the plaintiff contended that the defendant was liable for his act as being a person in "charge or control of any signal, points, . . . or of any part of the track of a railway." It appeared that in the morning of the same day, while the water was rapidly rising, the deceased had himself examined the bridge, and that in crossing the bridge he was not acting under the orders of any superior officer. It was held that the deceased was guilty of contributory negligence, and that the defendant was not liable under the act.

§ 114. *Exposure to Sudden and Imminent Danger.*

An employee who is injured by the negligence of any one for whose negligence the employer is liable under the Employers' Liability Act, through an exposure to a sudden and imminent danger caused by the negligent act of such person, is not required to act with the same coolness and judgment as if the danger were not sudden and unexpected. He will not be guilty of contributory negligence if he exercises the prudence of an ordinary or reasonable person under like circumstances.[1]

In Richmond &c. Ry. *v.* Farmer, 97 Ala. 141, a section foreman in the employ of the defendant railroad was injured by a locomotive engine while he was engaged in repairing a broken frog on a trestle. The trestle was about sixty feet long and from four to six feet high. Two engines were standing at opposite ends of the trestle, ready to cross as soon as the frog was repaired. The plaintiff notified one of the engineers to cross over slowly, so that he could watch the frog and switch and see how it worked, and he told the other engineer not to cross until he signalled to him. While the plaintiff was stooping down watching the frog, very shortly after the first engine had passed and before he had signalled for the second engine, the latter started to cross, and the plaintiff knew nothing of its approach until it was close upon him, when some one hallooed to him. In an action under the Employers' Liability Act for the negligence of the engineer in charge of the second engine, it was held that a charge

[1] Richmond &c. Ry. *v.* Farmer, 97 Ala. 141.

in the following language was correct: "A man under sudden excitement or peril is only required to exercise such care for his own safety as an ordinary, prudent man would have exercised under like circumstances, and, if he exercised such degree of care, then in that he is not guilty of contributory negligence."

§ 115. *Defendant's Responsible Employees must use Reasonable Care to avoid Injury to the Plaintiff when they know he is in a Dangerous Position.*

In Alabama the common-law rule of some jurisdictions, that contributory negligence of the plaintiff will not prevent a recovery if the defendant, knowing the plaintiff's dangerous position and negligence, fails to use reasonable care to avoid the injury,[1] has also been applied to actions under the Employers' Liability Act. Of course this rule does not render the common employer liable for the negligence of an ordinary co-employee, but merely for that of a responsible employee, such as a superintendent, or, in the case of a railroad, a person having the charge or control.

In Hissong *v.* Richmond &c. Ry., 91 Ala. 514, a switchman was injured while attempting to couple two railroad cars. The plaintiff testified that he first attempted to couple the cars with a stick, as required by

[1] Inland Coasting Co. *v.* Tolson, 139 U. S. 551; Lucas *v.* New Bedford &c. Ry., 6 Gray, 64, 72; Radley *v.* London &c. Ry., 1 App. Cas. 754; Tanner *v.* Louisville &c. Ry., 60 Ala. 621; Cook *v.* Central Ry., 67 Ala. 533; Louisville &c. Ry. *v.* Watson, 90 Ala. 68; Romick *v.* Chicago &c. Ry., 62 Iowa, 167; s. c., 15 Am. & Eng. R. R. Cases, 288; Denver Rapid Transit Co. *v.* Dwyer, 20 Colo. 132, 36 Pac. Rep. 1106; Kansas Pacific Ry. *v.* Cranmer, 4 Colo. 524; Austin *v.* New Jersey Steamboat Co., 43 N. Y. 75, 82.

the rules of the company, but could not do so because the draw-heads of the cars were not of the same height; that he then signalled the engineer to stop the train, and when it had stopped he went in between the cars to make the coupling by hand; that when he had been working on the pin thirty or forty seconds, and before he had made the coupling, the engineer moved the car backwards upon him and thereby caused his injuries. It was held, in an action under the Employers' Liability Act for the negligence of the engineer, as being a person in the charge or control of an engine, car, or train upon a railroad, that, although the plaintiff was guilty of negligence, the plaintiff was entitled to recover, because the engineer, with knowledge of the plaintiff's perilous position and negligence, failed to use ordinary care to avoid the injury.[1]

In Louisville &c. Ry. *v.* Markee, 103 Ala. 000, 15 So. Rep. 511, a section foreman riding on a hand-car was killed by a collision with a train moving in the same direction at its usual rate of speed. The hand-car had just emerged from a cut in the rocks where the locomotive engineer could not see the hand-car until within one hundred and fifty yards of it, on account of a curve in the track. As soon as the engineer saw the hand-car he put on the brakes and reversed the engine, and he testified that in his opinion this was the most effective way to stop a train. The conductor, however, testified that in his opinion the best way was to reverse the engine first and then apply the brakes. In an

[1] See, also, Louisville &c. Ry. *v.* Trammell, 93 Ala. 350; Alabama &c. Ry. *v.* Richie, 99 Ala. 346; Louisville &c. Ry. *v.* Watson, 90 Ala. 68; Louisville &c. Ry. *v.* Hurt, 101 Ala. 34; 13 So. Rep. 130.

action under the Employers' Liability Act, where the deceased had been guilty of contributory negligence in failing to flag the curve in the track, it was held that whether the conductor or the engineer was correct in his view, if the engineer adopted the means which he believed best adapted for stopping the train, and in good faith did all he could to prevent the collision, he was not guilty of such wanton or reckless negligence as to purge the contributory negligence of the deceased, and that the defendant was not liable.[1]

The fact that a railroad company maintains an overhead bridge which is only five feet and two inches above the tops of freight-cars, although it could be raised at small expense, does not constitute wilful or wanton negligence on its part which will render it liable under the statute to a brakeman who has been injured while guilty of contributory negligence.[2]

§ 116. *Employee's Right to rely upon Warning from Person.*

The surrounding facts and circumstances of the work may be such as to excuse an employee from using his eyes or ears to protect himself from danger, and to give him the right to rely upon a warning from some one else.[3] What are such facts and circumstances is sometimes a difficult question to decide. A few illustrations on both sides of the line will be given.

[1] See, also, Chambliss *v.* Mary Lee Coal Co. 103 Ala. 000; 16 So. Rep. 572.

[2] Louisville &c. Ry. *v.* Banks, 103 Ala. 000; 16 So. Rep. 547.

[3] Schultz *v.* Chicago &c. Ry., 44 Wis. 638; Ditberner *v.* Chicago &c. Ry., 47 Wis. 138; Maguire *v.* Fitchburg Ry., 146 Mass. 379.

In Davis *v.* New York &c. Ry., 159 Mass. 532, the plaintiff, while repairing the defendant's track, was run down by a train. His work required him to face to the north and to bend over the track, so that he could not see trains approaching from the south. It was the duty of his section boss or foreman of the gang to warn him of the approach of such trains. At the trial the evidence was conflicting as to whether this warning was given. It was held that the plaintiff was entitled to rely upon this warning, and that his doing so did not constitute contributory negligence. The court, by Holmes, J., says: "The defendant had put the plaintiff in a position in which the more closely he attended to his duty the less he was able to be on the watch, and had put a foreman there for the express purpose of warning him. Under such circumstances the jury well might say that the plaintiff was justified in relying on the foreman's doing what the defendant admitted that he was bound to do, and said that he did. A man alongside another in this way can make sure of his warning being understood. The case is not like one where the only warning relied on must come from the train." Page 535. As the failure to give the warning was the negligence of the defendant's superintendent, it was further held that the plaintiff was entitled to recover under the Massachusetts statute.[1]

In Lynch *v.* Boston & Albany Ry., 159 Mass. 536, the plaintiff's intestate was killed by a shunted car while engaged in cleaning under a switch-bar in the defendant's yard. The work could only be done in a stooping

[1] See, also, Lynch *v.* Allyn, 160 Mass. 248; Burgess *v.* Davis Sulphur Ore Co., 165 Mass. 71; 42 N. E. Rep. 501.

position, which naturally withdrew his attention from approaching trains or cars. The plaintiff contended that the deceased was excused from using his eyes for his own protection, upon the ground that the defendant had given him the right to rely upon being warned of the approach of a car or train. The strongest evidence of this was the statement of the section foreman that he generally looked out for the men the best he could, and warned them, but that the men had to look out for themselves when they were in different parts of the yard, and that at the time of the accident the men were separated. The presiding judge ordered a verdict for the defendant, and the full court held that this ruling was correct, for the reason that the deceased in failing to use his eyes was guilty of negligence, and that he had no right to rely upon being warned either by the section foreman or by a person on the approaching car.. The case was stated by the court on page 538 to be "not so strong for the plaintiff as if the deceased had been run down by an engine, which ordinarily would have a man on the lookout." [1] Maguire *v.* Fitchburg Railroad, 146 Mass. 379, was distinguished on the ground that in that case "there was an implied assurance that the use of the track was suspended." Page 537, by Holmes, J.

§ 117. *Same.*

In Donahoe *v.* Old Colony Ry., 153 Mass. 356, the plaintiff was jammed between an engine and a car,

[1] Citing Shea *v.* Boston & Maine Ry., 154 Mass. 31 ; Aerkfetz *v.* Humphreys, 145 U. S. 418, 420. See, also, Railway Co. *v.* Murphy, 50 Ohio St. 135.

while he was attempting to uncouple the car, by reason of a broken draw-bar. The plaintiff was a brakeman, and during a temporary absence from his post the conductor chained to the engine a car with a broken draw-bar, and omitted to inform the plaintiff of the fact. He was ignorant of this danger, and in the course of his duty he stepped into the freight-car chained to the engine, and, without looking down to see, with the aid of his lantern, whether the draw-bar was all right, he called to the engineer to back the engine so that he could pull out the coupling-pin easily. The engine was backed quickly, and by reason of the broken draw-bar the tender came in close contact with the forward end of the car upon which the plaintiff stood, and crushed his leg. It was held that the jury was justified in finding that the proximate cause of the injury was the conductor's omission to inform the plaintiff of the broken draw-bar, and that the plaintiff was in the exercise of due care and diligence. The conductor having been in charge of the train, it was further held that the common employer was liable in damages under the statute for the injury.

In Steffe *v.* Old Colony Ry., 156 Mass. 262, a car-inspector, while inspecting a moving train, was struck by another moving train. The evidence tended to show that it was customary to inspect moving trains; that the other train came upon the plaintiff unexpectedly and rapidly, without any warning from the brakeman on the approaching train, who was stationed there to give warning or to stop the train. It was held that the jury was warranted in finding that the plaintiff was in the exercise of due care and diligence, under the terms of

the statute. The circumstances were such as to entitle the plaintiff to rely upon a warning from the brakeman who was in charge or control of the train.[1] The failure to give this warning was the negligence of a person for whose acts the railroad company was liable. Hence the plaintiff was entitled to recover damages.

It is not essential, however, that the warning should be given by a superintendent, or other person in charge or control of the injured employee. If it is duly given by a co-employee, it is sufficient to exonerate the common employer in an action under the act.[2]

§ 118. *Warning from Object.*

The warning upon which an employee is entitled to rely may come from a part of the defendant's ways, works, or machinery, as well as from a person. Thus, in Maher *v.* Boston & Albany Ry., 158 Mass. 36, a freight brakeman was instantly killed by reason of his head coming in contact with a bridge, the approach to which was guarded by a tell-tale which was out of order. His duty required him to ride on the top of the rear end of the train, where there was a tall refrigerator car, and to watch the rear end of the train with his face to the rear. He knew that there were low bridges under which the car must pass. In an action under the Employers' Liability Act, the defendant contended that the deceased was not in the exercise of due care in failing to keep a lookout for the bridge. But the court held that the circumstances justified him in relying upon the tell-tale for warning of his approach

[1] Davis *v.* New York &c. Ry., 159 Mass. 532.

[2] Alabama Coal Co. *v.* Pitts, 98 Ala. 285.

to the bridge, and that the jury was warranted in finding that he was in the exercise of due care and diligence. As the tell-tale was out of order and did not give the warning, a verdict for the plaintiff was sustained.

Where, however, the brakeman's duty does not require him to sit in a dangerous place, and he assumes such position merely for his own comfort or convenience, and he is familiar with the route and the location of the bridges, the fact of a defect in the bridge, and the absence of "whip-straps" or other warning signal near the bridge which knocks him off the train, will not render the employer liable under the Alabama act, because the brakeman is guilty of contributory negligence.[1]

§ 119. *Inference of Due Care.*

In a few cases where an employee has been killed and his death was not witnessed by any one, the Massachusetts court has held that an inference of his due care is justified if all the attending circumstances are in evidence and they fail to show any fault on his part. The mere absence of evidence of his fault will authorize a finding of due care.[2] This rule is an important qualification of the Massachusetts rule that the burden is upon the plaintiff to show due care. If direct and positive evidence of what the injured person was doing at the time of the injury were required, a plaintiff could never recover when the injury resulted in immediate death and no one witnessed the accident.

[1] Schlaff *v.* Louisville &c. Ry., 100 Ala. 377.

[2] Caron *v.* Boston & Albany Ry., 164 Mass. 523 ; Thyng *v.* Fitchburg Ry., 156 Mass. 13 ; Maguire *v.* Fitchburg Ry., 146 Mass. 379.

In Griffin *v.* Overman Wheel Co., 61 Fed. Rep. 568, a night-watchman was found dead on the ground below a narrow unrailed bridge running between two buildings owned by the defendant. It was customary for him to pass over this bridge in making his rounds. The night of his death was cold, dark, and frosty, and the bridge was in a slippery condition. There was no direct and positive evidence as to what he was doing at the time he met his death, or as to how it was caused. In an action under the Massachusetts act of 1887, the presiding judge ruled, at the defendant's request, that there was no evidence that the deceased was in the exercise of due care, and ordered a verdict for the defendant. The Circuit Court of Appeals, however, set aside the verdict and ordered a new trial, on the ground that the facts proved would justify the jury in the inference that he was in the exercise of due care.

§ 120. *Selecting Dangerous Mode of performing Work when Safe Way exists.*

Contributory negligence may consist in choosing a dangerous mode of doing work when there is a safer way of performing the same duty.

Thus, if the uncoupling of cars in motion may be effected in safety while standing on the platform of one of them, an employee who goes in between them and attempts to uncouple them while in motion is guilty of contributory negligence, and cannot recover under the Alabama Employers' Liability Act for a defect in the condition of the draw-head attached to one of the cars.[1]

In Tennessee Coal Co. *v.* Herndon, 100 Ala. 451, 458,

[1] Memphis &c. Ry. *v.* Graham, 94 Ala. 545.

Mr. Justice Coleman for the court says, in an action under the statute: "If a party selects a dangerous way to perform a duty when there is a safe way, knowing the way selected to be dangerous, or if the danger is 'apparent' or 'obvious,' then he assumes the risk, and is guilty of contributory negligence." But in the same case it was held that the mere fact that an employee was injured because of the way selected by him, when if he had selected the other way he would have escaped injury, does not of itself constitute contributory negligence, and that the result of his action is not the true test of the question. In this case the plaintiff's intestate, while assisting the regular "dumper" in turning the cinder out of a large pot, was jerked into the pot by its sudden tilting over, and was killed by contact with the mass of molten cinder in the pot. At the time of the accident the deceased was standing on the trucks which supported the cinder-pot. The evidence was conflicting as to whether the ground or the trucks were the safer place to stand for this purpose. It was held that a verdict for the plaintiff was proper, there having been certain defects in the safety chains and other apparatus connected with the pot.

In Louisville &c. Ry. *v.* Orr, 91 Ala. 548, 554, Mr. Justice Coleman, in delivering the opinion of the court, says: "If there was evidence to satisfy the jury that plaintiff's intestate selected a dangerous way to pass from one car to another, knowing that the way selected was dangerous, when there was a safe way apparent to him, he was guilty of such contributory negligence as to constitute a full defence to the action."[1]

[1] Citing Mobile &c. Ry. *v.* Holborn, 84 Ala. 137.

A workman who feeds a circular saw by means of his hand, knowing a safer practicable method, is not in the exercise of due care, and cannot recover against his employer at common law for an injury to his hand caused by a defect in the saw.[1] An employee who, at the request of a fellow-workman, mounts a ladder to repair a dangerous part of the machinery while it is in motion, instead of waiting to have it stopped, is guilty of contributory negligence, and cannot recover for an injury caused by a defect in the ladder.[2]

§ 121. *Same.*

In Richmond &c. Ry. *v.* Bivins (Ala.), 15 So. Rep. 515, a freight brakeman was pulled off the caboose, as he was boarding it after setting a switch, by his clothes catching in the switch. At the station where the accident happened the conductor gave the plaintiff this order: "Set up your switch; catch your caboose; hold the cars; cut them loose; run them on the side track, and get away quick." In obedience to these instructions, the plaintiff set the switch, and, after the cars had passed from the main track on to the side track, he stood near the switch waiting for the train to back down to him, and when the rear platform of the caboose reached him, he grasped the rails of the rear platform with both hands, put his left foot on the lowest step of the platform, and while in the act of drawing up his right foot the leg of his trousers was caught in the machinery of the switch, his right foot drawn back, his left foot slipped from the step, and both legs were drawn under

[1] Wilson *v.* Steel Edge Stamping Co., 163 Mass. 315.
[2] Cahill *v.* Hilton, 106 N. Y. 512.

the cars and cut off just below the knees. There was evidence tending to show that it was customary for brakemen on the defendant railroad to board trains in motion after setting switches, though it was not disputed that the brakeman could stop the train, if he chose to do so, and make it wait while he boarded it. It was held that, in boarding the train while in motion instead of making it stop and then boarding it, he was guilty of contributory negligence as matter of law, and that a verdict should have been ordered for the defendant. In the opinion by Mr. Justice Haralson it is said on page 517: "It is a familiar principle, which common sense as well as the rules of law ought to teach any one, that where one in the employ of a railroad knowingly selects a dangerous way when a safer one is apparent to him, and is thereby injured, he is guilty of contributory negligence." The learned justice also states that, "with the loss of only a moment or two, he might have brought it [the train] to a standstill, to enable him to board it."[1] This case was followed with approval in Davis *v.* Western Ry., 104 Ala. 000, 18 So. Rep. 173.

[1] This case seems to carry the doctrine of contributory negligence to an unwarrantable extent. The plaintiff was acting under orders to be quick, and he would have violated these orders if he had brought the train to a standstill in order to enable him to board it in safety. The loss of even a moment or two, at each place where a switch is set for a freight train, would greatly increase the running time, and a brakeman who persisted in such conduct would not retain his position very long. The case should have been submitted to the jury. Hannah *v.* Connecticut River Ry., 154 Mass. 529; Lawless *v.* Connecticut River Ry., 136 Mass. 1; Bowers *v.* Connecticut River Ry., 162 Mass. 312.

§ 122. *Other Illustrations of Due Care and Contributory Negligence.*

Due care and diligence do not require a brakeman to abandon his post and jump from the car at the first instant that he discovers there is trouble with the brake, although the car is on a descending grade without a locomotive.[1]

In Sullivan *v.* Old Colony Ry., 153 Mass. 118, a switchman was killed by a locomotive engine while in the act of recrossing the tracks after throwing a switch. The injury occurred in the daytime, at a time when a locomotive usually passed. He turned his back to the engine, and did not look around towards the engine until just before it struck him. In an action by his widow under the Employers' Liability Act, it was held that he was not in the exercise of due care and diligence at the time of the injury, and that the plaintiff could not recover.

In Lothrop *v.* Fitchburg Railroad, 150 Mass. 423, a freight brakeman was killed by having his head crushed between the ends of two projecting timbers on two flat cars, while in the act of coupling them. He had been given general orders by the conductor to do the coupling, and had made several couplings on the north side of the track before the injury occurred. The timbers which killed him projected over the north side of the cars, and the coupling could have been safely done either from the south side of the track or from beneath the cars. It was about noon on a clear day, and there was nothing to distract his attention. In this action

[1] Spaulding *v.* Flynt Granite Co., 159 Mass. 587.

against the railroad company under the Employers' Liability Act, it was held that the danger was an obvious one, and that the deceased was not in the exercise of due care and diligence within the meaning of the act, and that the action could not be maintained. In delivering the opinion of the court, Mr. Justice Field says: "The general rule of law is, that when the danger is obvious, and is of such a nature that it can be appreciated and understood by the servant as well as by the master, or by any one else, and when the servant has as good an opportunity as the master or as any one else of seeing what the danger is, and is permitted to do his work in his own way, and can avoid the danger by the exercise of reasonable care, the servant cannot recover against the master for injuries received in consequence of the condition of things which constituted the danger. If the servant is injured, it is from his own want of care." Pages 424, 425.

Upon like facts it has been held that the employer was not liable at common law.[1]

In Browne *v.* New York &c. Ry., 158 Mass. 247, a brakeman was killed by a freight-car falling over upon him. He was sent to uncouple the caboose car from the engine, in order that it might make a flying switch. The engineer slackened the speed of the train to let the brakeman pull out the coupling-pin, and, although the deceased did not succeed in pulling the pin out, he gave the signal for the engineer to go faster. The engineer increased the speed of the train, and as soon as the engine passed the switch the switchman threw the switch, the coupling held, the caboose car was pulled off the track,

[1] Boyle *v.* New York &c. Ry., 151 Mass. 102.

and fell over and killed the brakeman. The pin and the hole in the stiff shackle were in good condition. In an action by the brakeman's dependent next of kin under the statute, it was held that the brakeman was guilty of contributory negligence in giving the signal to start faster before he had pulled out the pin, and that the plaintiff could not recover.

It is not contributory negligence for a switchman to stand upon the foot-board of an engine-tender in uncoupling a car from the tender, although a rule of the company forbids switchmen to go between the cars in coupling or uncoupling; and such act will not defeat a recovery under the Employers' Liability Act of Alabama.[1]

For other illustrations as to what conduct by an injured employee is or is not due care and diligence within the meaning of the Employers' Liability Act, see the cases cited in the note.[2]

[1] Richmond &c. Ry. *v.* Jones, 92 Ala. 218.

[2] Graham *v.* Boston & Albany Ry., 156 Mass. 4; McLean *v.* Chemical Paper Co., 165 Mass. 5; 42 N. E. Rep. 330; Burgess *v.* Davis Sulphur Ore Co., 165 Mass. 71; 42 N. E. Rep. 501; Mobile &c. Ry. *v.* Holborn, 84 Ala. 133; Louisville &c. Ry. *v.* Woods, 104 Ala. 000; 17 So. Rep. 41.

CHAPTER IX.

NOTICE.

Section
123. Statutes relating to notice.
124. Prior notice necessary.
125. Written notice required.
126. Notice in case of instantaneous death.
127. Notice must show that it was intended as the basis of a claim for damages.
128. Notice of the "time" of the injury.
129. Notice of the "place" of the injury.
130. Notice of the "cause" of the injury.
131. No intention to mislead, etc.
132. Notice signed by plaintiff's attorney.

§ 123. *Statutes relating to Notice.*

The Massachusetts statute relating to notice, together with the amendment of 1888, ch. 155 (the amendment being enclosed within brackets), reads as follows: —

"No action for the recovery of compensation for injury or death under this act shall be maintained unless notice of the time, place, and cause of the injury is given to the employer within thirty days, and the action is commenced within one year from the occurrence of the accident causing the injury or death. [The notice required by this section shall be in writing, signed by the person injured or by some one in his behalf; but if, from physical or mental incapacity, it is impossible for the person injured to give the notice within the time provided in said section, he may give the same within ten days after such incapacity is

removed; and in case of his death without having given the notice, and without having been for ten days at any time after his injury of sufficient capacity to give the notice, his executor or administrator may give such notice within thirty days after his appointment.] But no notice given under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or cause of the injury; provided it is shown that there was no intention to mislead, and that the party entitled to notice was not, in fact, misled thereby."[1]

The provisions of the Colorado act are very like those of Massachusetts upon this subject, except that sixty days instead of thirty days are allowed.[2] This act, and also the English act, are contained in the Appendix. The Alabama act does not require notice to be given, nor does the Indiana statute.

§ 124. *Prior Notice Necessary.*

Where notice is required, no action can be maintained under the Employers' Liability Acts unless notice of the injury has been given before the action is brought. The mere bringing of the action is not sufficient notice.[3] "The requirement of notice is held to make a condition precedent to the right to bring an action, not on a nice interpretation of the particular words used, but upon a general view of what the legis-

[1] Mass. St. 1887, ch. 270, § 3. See, also, Mass. St. 1894, ch. 389.

[2] Colo. Laws of 1893, ch. 77, § 2.

[3] Foley *v.* Pettee Machine Co., 149 Mass. 294, 296; Moyle *v.* Jenkins, 8 Q. B. D. 116, 118; Keen *v.* Millwall Dock Co., 8 Q. B. D. 482, 484.

lature would be likely to intend." [1] The making out of the writ is deemed the bringing of the action within the meaning of this rule. If the writ be made out in the morning and the notice be served in the afternoon of the same day, the action cannot be maintained.[2]

§ 125. *Written Notice required.*

The Massachusetts act of 1887 did not expressly require the notice to be in writing; but by the amendment passed in 1888 (St. 1888, ch. 155, § 1) written notice was rendered necessary to the maintenance of an action under the statute.

In England, although the statute does not in terms require written notice, yet the provisions relating to giving the name and address of the person injured, and to serving the notice by post, etc., have been held to show that the notice must be in writing.[3]

In Keen *v.* Millwall Dock Co., 8 Q. B. D. 482, the plaintiff made a verbal report of his injury to the defendant's inspector, who took down the details in writing and sent them to the superintendent. Afterwards the plaintiff's solicitor wrote a letter to the defendant, stating that he was instructed to apply for compensation for the injury, "particulars of which have already been communicated to your superintendent." It was held by the Court of Appeal that the notice was not in writing, and that the action could not be maintained.

[1] Veginan *v.* Morse, 160 Mass. 143, 146, per Holmes, J.

[2] Veginan *v.* Morse, 160 Mass. 143.

[3] Moyle *v.* Jenkins, 8 Q. B. D. 116; Keen *v.* Millwall Dock Co., 8 Q. B. D. 482.

§ 126. *Notice in Case of Instantaneous Death.*

When the employee is instantly killed, the notice required by the Massachusetts statute may be given either by some one in his behalf, as by his widow, within thirty days from the occurrence of the accident causing his death,[1] or by the executor or administrator within thirty days after his appointment.[2] Although it was intimated in Gustafsen *v.* Washburn & Moen Manuf. Co., 153 Mass. 468, that notice by an executor or administrator would not support an action by the next of kin, it was subsequently decided that such notice was sufficient for that purpose, on the ground, as stated by Mr. Justice Allen for the court, that "the statute was designed to extend the liability of employers for personal injuries suffered by employees in their service, and the requirements as to notice should receive a liberal construction."[3]

§ 127. *Notice must show that it was intended as the Basis of a Claim for Damages.*

Where the notice given failed to show that it was intended as the basis of a claim against the defendant, or that it was given in behalf of the plaintiff, it was held that an action under the Employers' Liability Act could not be maintained.[4]

[1] Gustafsen *v.* Washburn & Moen Manuf. Co., 153 Mass. 468.

[2] Daly *v.* New Jersey Steel Co., 155 Mass. 1.

[3] Daly *v.* New Jersey Steel Co., 155 Mass. 1, 4.

[4] Driscoll *v.* Fall River, 163 Mass. 105. See, also, Kenady *v.* Lawrence, 128 Mass. 318. But see Taylor *v.* Woburn, 130 Mass. 494; Savory *v.* Haverhill, 132 Mass. 324.

§ 128. *Notice of the "Time" of the Injury.*

Under the Massachusetts act it is not necessary that the notice should state the hour when the injury occurred. A statement of the day is sufficient.[1] A like rule prevails under the statute relating to defects in highways.[2] In Taylor *v.* Woburn, *ubi supra*, notice that the injury was received on "Christmas morning" was held to sufficiently state the time of the accident.

§ 129. *Notice of the "Place" of the Injury.*

With respect to the place of the injury, under the Massachusetts Employers' Liability Act, the decisions under the statute giving a right of action for personal injuries caused by defects in the highway are in point.

As to what description of the "place" of an accident for an injury caused by a defect in a highway is sufficient under the statute of Massachusetts (Pub. Sts. ch. 52, § 18), see below.[3]

As to what description of the place of a highway accident is not sufficient, see cases cited in the footnote.[4]

[1] Donahoe *v.* Old Colony Ry., 153 Mass. 356; Drommie *v.* Hogan, 153 Mass. 29.

[2] Taylor *v.* Woburn, 130 Mass. 494; Lyman *v.* Hampshire, 138 Mass. 74; Cronin *v.* Boston, 135 Mass. 110; Aston *v.* Newton, 134 Mass. 507.

[3] Hughes *v.* Lawrence, 160 Mass. 474; Connors *v.* Lowell, 158 Mass. 336; Richardson *v.* Boston, 156 Mass. 145; Pendergast *v.* Clinton, 147 Mass. 402; Lyman *v.* Hampshire, 138 Mass. 74; Sargent *v.* Lynn, 138 Mass. 599; Aston *v.* Newton, 134 Mass. 507; Welch *v.* Gardner, 133 Mass. 529.

[4] Gardner *v.* Weymouth, 155 Mass. 595; Shallow *v.* Salem, 136 Mass. 136; Cronin *v.* Boston, 135 Mass. 110; Post *v.* Foxborough, 131 Mass. 202; Miles *v.* Lynn, 130 Mass. 398; Donnelly *v.* Fall River, 130 Mass. 115.

§ 130. *Notice of the "Cause" of the Injury.*

In Beauregard *v.* Webb Granite Co., 160 Mass. 201, an employee was killed by a stone falling upon him through negligence in raising it without warning him. The notice to the employer stated that the deceased was killed "by a stone being precipitated upon him from your derrick as a result of your negligence, and of the negligence of some person for whose negligence you are liable." Held, that the cause of the injury was either stated with sufficient accuracy, or that the jury might have found it sufficient, on the ground that there was no intention to mislead, and that in fact the defendant was not misled by it.

In Donahoe *v.* Old Colony Ry., 153 Mass. 356, in which a freight brakeman was injured by reason of the conductor's negligence in chaining a car with a broken draw-bar to the engine, and in failing to notify the plaintiff of the fact, it was held that the following notice stated the time, place, and cause of the injury with sufficient accuracy: —

"The Old Colony Railroad Company is hereby notified that on the fifteenth day of October, 1888, when within one hundred yards northerly from the railroad station at Readville, Mass., on that part of the said Old Colony Railroad Company formerly known as the Boston and Providence Railroad Company, I was injured by my right leg being caught between a dump-car and tender of an engine, I at the time standing on the dump-car, which was the first car of a train of cars to which said tender of said engine was attached. Said injury was caused by reason of a broken draw-bar on

the dump-car, which allowed the dolly varden on the tender of the engine to run up against the end of the dump-car, and which caught and injured my leg.[1] This notice is given under the provisions of chapter 270 of the Acts and Resolves of Massachusetts of the year 1887, and of chapter 155 of said acts of the year 1888."

In Lynch *v.* Allyn, 160 Mass. 248, the notice stated the cause of the injury to be "the falling of a bank of earth." The proof was to the effect that the defendant's superintendent failed to station any one on the bank to warn the plaintiff of the danger of the bank's falling, and also failed to shore up the bank. It was objected that the notice was defective because it did not refer to the superintendent or to his conduct; but the court held that the cause of the injury was properly stated, and added that "it was not necessary for the plaintiff to state the cause of that cause."[2]

In Brick *v.* Bosworth, 162 Mass. 334, plaintiff's husband was instantly killed, and the notice stated the cause of the injury in these words: "The cause of the death of my said husband was the falling of a derrick upon him on account of the same being improperly or insecurely fastened." It was held that the notice was sufficiently full and specific to entitle the plaintiff to recover, either under the second clause, relating to the negligence of a superintendent, or under the first clause, relating to a defect in the condition of the ways, works, or machinery, etc.

[1] The facts stated in the report of the case show that the chief cause of the injury was the negligence of the conductor in omitting to inform the plaintiff of the broken draw-bar.

[2] Per Lathrop, J., for the court, p. 255.

In actions for defects in the highway, the following cases contain illustrations of sufficient descriptions of the "cause" of the injury: Young *v.* Douglass, 157 Mass. 383; Richardson *v.* Boston, 156 Mass. 145; Pendergast *v.* Clinton, 147 Mass. 402; Canterbury *v.* Boston, 141 Mass. 215; Grogan *v.* Worcester, 140 Mass. 227; Davis *v.* Charlton, 140 Mass. 422; Dalton *v.* Salem, 136 Mass. 278; Aston *v.* Newton, 134 Mass. 507; McCabe *v.* Cambridge, 134 Mass. 484; Welch *v.* Gardner, 133 Mass. 529; Bailey *v.* Everett, 132 Mass. 441; Whitman *v.* Groveland, 131 Mass. 553; Taylor *v.* Woburn, 130 Mass. 494.

For insufficient statements of the "cause" of a highway accident, see Roberts *v.* Douglass, 140 Mass. 129; Lyon *v.* Cambridge, 136 Mass. 419; Cronin *v.* Boston, 135 Mass. 110; Shea *v.* Lowell, 132 Mass. 187; Dalton *v.* Salem, 131 Mass. 551; Madden *v.* Springfield, 131 Mass. 441; Noonan *v.* Lawrence, 130 Mass. 161; Miles *v.* Lynn, 130 Mass. 398.

§ 131. *No Intention to mislead, etc.*

In Drommie *v.* Hogan, 153 Mass. 29, the notice stated the cause of the plaintiff's injury to be "by reason of a defective or insufficient staging, and the fall of the staging." The plaintiff's proof showed that the cause of the injury was a defective condition of a ledger-board, which broke and caused the staging to fall. The defendant contended that he was misled by the notice, and testified that he did not know what defect was referred to in the notice, or that the ledger-board was broken. The evidence showed further, however, that shortly after the injury the defendant came to

the place where it happened and assisted in taking away the injured man; and that the staging and the broken ledger-board then lay in a heap upon the ground. The court held that even if the notice was defective in stating the cause of the injury, which the court did not decide, still the evidence warranted the jury in finding that the plaintiff had no intention to mislead the defendant, and that the latter was not in fact misled thereby.

In actions against cities or towns for defects in the highways, the statute contains like provisions respecting an absence of intention to mislead. As to what notices are or are not sufficient under this clause, see Fuller *v.* Hyde Park, 162 Mass. 51; Norwood *v.* Somerville, 159 Mass. 105; Veno *v.* Waltham, 158 Mass. 279; Gardner *v.* Weymouth, 155 Mass. 595; Bowes *v.* Boston, 155 Mass. 344; Fortin *v.* Easthampton, 142 Mass. 486; Liffin *v.* Beverly, 145 Mass. 549; Canterbury *v.* Boston, 141 Mass. 215.

§ 132. *Notice signed by Plaintiff's Attorney.*

Under the Massachusetts statute of 1888, ch. 155, which provides that the notice "shall be in writing, signed by the person injured, or by some one in his behalf," a notice signed by his attorney thus, "A B, attorney for C D," is a sufficient signing on behalf of C D.[1]

[1] Dolan *v.* Alley, 153 Mass. 380. See, also, Spellman *v.* Chicopee, 131 Mass. 443.

CHAPTER X.

LIMITATION OF ACTIONS.

Section
133. Statutes, etc.
134. Amendment setting forth new cause of action, filed after statute of limitations has run.
135. Same. Injury received in another State.
136. Do exceptions or saving clauses in the general statute of limitations apply to actions under the Employers' Liability Acts?
137. Conflict of laws.
138. Same.
139. Same. When Employers' Liability Act does not limit time for action.
140. Same. When right exists at common law.

§ 133. *Statutes, etc.*

THE third section of the Massachusetts act provides that —

"No action for the recovery of compensation for injury or death under this act shall be maintained unless . . . the action is commenced within one year from the occurrence of the accident causing the injury or death." [1]

The period in Colorado is two years; and in England six months, or in case of death twelve months, from the time of death.[2]

The Alabama Employers' Liability Act prescribes no time for the commencement of action. The matter is therefore controlled by the general statute of limita-

[1] St. 1887, ch. 270, § 3.

[2] Colorado Laws of 1893, ch. 77, § 2; 43 & 44 Vict. cap. 42, § 4.

tions. In O'Kief *v.* Memphis &c. Ry., 99 Ala. 524, a close question arose; namely, whether an action under the Employers' Liability Act for the negligent killing of an employee was governed by section 2589 of the Code, prescribing two years for the negligent killing of a human being, or by section 2619, clause 6, providing that "actions for any injury to the person or rights of another, not arising from contract, and not herein specifically enumerated," shall be brought within one year. A majority of the court held, without assigning reasons, that the action was governed by the one-year period, and therefore barred in this case. It follows, *à fortiori*, that, where the employee's injury does not result in death, the action under the statute is barred in one year.[1]

§ 134. *Amendment setting forth New Cause of Action, filed after Statute of Limitations has run.*

The time limited for bringing suit under the Employers' Liability Act applies not only to the action itself, but also to an amendment to the declaration which sets forth a new and independent cause of action not embraced in the original declaration. If the statutory period has elapsed between the date of the injury and the date of filing the amendment, no recovery can be had upon the amended cause of action if it sets up a new cause of action.[2] This rule is well settled; the difficulty arises in applying it in practice, and in deter-

[1] See O'Shields *v.* Georgia Pacific Ry., 83 Ga. 621; Louisville &c. Ry. *v.* Woods, 104 Ala. 000; 17 So. Rep. 41.

[2] Sicard *v.* Davis, 6 Peters, 124; Exposition Cotton Mills *v.* Western &c. Ry., 83 Ga. 441.

mining whether a given amendment involves a new cause of action within the meaning of the rule. If the amendment does not set up a new cause of action, but is merely a more specific statement of the original cause of action, it is deemed to relate back to the commencement of the action.

In Alabama the rule has been enforced with some strictness against plaintiffs. In Mohr *v.* Lemle, 69 Ala. 180, 183, Mr. Chief Justice Brickell says for the court: "The whole doctrine of relation rests in a fiction of law adopted to subserve and not to defeat right and justice. When the amendment introduces a new right or new matter, not within the *lis pendens* and the issue between the parties, if, at the time of its introduction, as to such new right or matter, the statute of limitations has operated a bar, the defendant may insist upon the benefit of the statute, and to him it is as available as if the amendment were a new and independent suit."

In Alabama &c. Ry. *v.* Smith, 81 Ala. 229, the original declaration averred that the plaintiff, being a passenger on the defendant railroad, was forcibly ejected from his seat before he reached his destination. The amendment set up that he was induced to leave his seat and to alight at the wrong station by the porter calling out the name of his station. It was held that the amendment presented a new cause of action, and that the action upon it was barred by the statute of limitations, as it did not relate back to the time of commencing the action.

Birmingham Furnace Co. *v.* Gross, 97 Ala. 220, was an action under the Alabama Employers' Liability Act for an injury resulting in the death of plaintiff's intes-

tate. The original complaint contained several counts, alleging, in different forms, that his death had been caused by the defendant's negligence. An amendment setting forth the same acts, with the additional charge that the intestate acted in conformity to the orders of a person to whose orders he was bound to conform, was allowed by the trial court. It was held that the amendment was within the *lis pendens;* that it did not set up a new cause of action within the meaning of the rule; and that it was not barred, but related back to the time of the commencement of the action.[1]

In Texas & Pacific Ry. *v.* Cox, 145 U. S. 593, the declaration alleged that a freight conductor was injured while attempting to make a coupling of cars, because of the defective condition of the cross-ties and of the road-bed. The amendment, filed after the time allowed for bringing an action had elapsed, further averred that Cox, in coupling the cars, as it was his duty to do, was injured because the draw-head and coupling-pin were not suitable for the purpose for which they were to be used. It was held that the action was not barred, for the reason that, "as the transaction set forth in both counts was the same, and the negligence charged in both related to defective conditions in respect of coupling cars in safety, we are not disposed by technical construction to hold that the second count alleged another and different negligence from the first." Page 604.

In Texas &c. Ry. *v.* Grimes, 8 Texas Civ. App. 000, 29 S. W. Rep. 1104, it was held that a declaration alleging merely that the defendant had failed to employ the

[1] See, also, Alabama Great Southern Ry. *v.* Chapman, 83 Ala. 453; Louisville &c. Ry. *v.* Woods, 104 Ala. 000; 17 So. Rep. 41.

plaintiff may be amended, after the statute of limitations has fully run, by alleging also a breach of an agreement to pay a certain amount during plaintiff's disability.

§ 135. *Same. Injury received in Another State.*

In Union Pacific Ry. *v.* Wyler, 158 U. S. 285, the plaintiff, while in the employ of the defendant railroad, was injured in April, 1883, in the State of Kansas. The action was brought in a state court of Missouri in September, 1885, and was removed to the federal court for that district. The original declaration based the action upon the incompetency of a fellow-servant, one Kline, through whose negligence the injury occurred. In November, 1888, more than five years after the injury occurred, the plaintiff, with the defendant's consent, filed an amended petition, grounding his action upon the Kansas statute of 1874, which is quoted in the footnote.[1] The Missouri period of limitation for personal injuries was five years, and this was pleaded as a defence to the amended petition. The question was therefore directly presented whether or not the amendment set forth a new cause of action. The court held that it did set forth a new cause of action, and that the action was therefore barred by the Missouri statute of limitations. It was further decided that the limitation bar was not prevented from attaching by the fact that the amendment was filed by consent; nor by the fact

[1] "Every railroad company organized or doing business in this State shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees to any person sustaining damage." Laws of Kansas, 1874, ch. 93, § 1.

that the federal courts take judicial notice of the laws of all the States, though the conclusion was said to be "strengthened" (page 295) by the rule of law prevailing in Missouri,[1] as well as in most of the States, that a statute of a sister State is regarded as matter of fact, which must be pleaded and proved. As the original petition relied merely upon the general common-law liability of a master for employing an incompetent servant, the amendment, setting up a special liability founded upon a statute of another State, was held to be a departure in pleading, averring a new cause of action, upon which the statute of limitations ran from the time of the injury to the time of the filing of the amendment, and did not relate back to the commencement of the suit.

In Bolton *v.* Georgia Pacific Ry., 83 Ga. 659, the same question was decided respecting the Alabama Employers' Liability Act. The plaintiff, while in the employ of the defendant railroad, was injured in Alabama and brought this action in Georgia. The original declaration was founded on the common-law liability of the employer for furnishing defective material. The amendment, offered after the Georgia statute of limitations had run, set up a liability conferred by the Alabama statute in terms. The facts alleged in both were substantially alike, and the plaintiff argued that simply to mention the Alabama statute in the amendment, and recite the same facts, would not set up a new cause of action. But the court held that the amendment offered did set up a new cause of action, and that the trial judge properly refused to allow the amendment, because the cause of action stated therein was barred.

[1] Babcock *v.* Babcock, 46 Mo. 243.

In Nashville &c. Ry. *v.* Foster, 10 Lea (Tenn.), 351, however, a decision of a contrary tendency was rendered. A brakeman in the defendant railroad's employ was killed in Alabama, but the original declaration counted on the Tennessee statute apparently; at least it did not state or rely upon the Alabama statute. After the limitation period had elapsed an amendment was allowed setting forth the Alabama statute. It was held that the amendment did not introduce a new cause of action, and that it related back to the time the action was commenced, and prevented the bar from attaching. It is possible, however, to distinguish this case from the two preceding cases on the ground that here the liability described, both in the original declaration and in the amendment, was a special statutory liability, while in the two preceding cases the liability alleged in the original declaration was a general common-law liability, and that alleged in the amendment was a special statutory liability.

If, however, the original declaration shows that the plaintiff relies upon the statute of the State of injury, and the foreign statute is merely pleaded in a defective manner, he may amend by setting out the statute properly, and such amendment will relate back to the time of bringing suit. This is not the addition of a new cause of action, but is merely a more correct statement of the original cause, and is therefore not barred unless the original action was barred.[1]

A like rule applies where the injury occurs in one State, whose statute giving the right of action also limits

[1] South Carolina Ry. *v.* Nix, 68 Ga. 572; Bolton *v.* Georgia Pacific Ry., 83 Ga. 659, 660.

the time for action, and the suit is brought in another State, without declaring upon the statute of the State of injury. In such case the declaration cannot be amended by adding a count on the foreign statute after the time prescribed by that statute for bringing suit has elapsed.[1]

§ 136. *Do Exceptions or Saving Clauses in the General Statute of Limitations apply to Actions under the Employers' Liability Acts?*

The Employers' Liability Acts contain no exceptions or saving clauses allowing further time to sue, while the general statutes of limitation contain various clauses of this nature. Thus, the general statute of Massachusetts gives minors and some others further time to sue. The question therefore arises, do the usual saving clauses in the general statute of limitations apply to actions under the Employers' Liability Act, when that act itself contains no saving clause? If, as in Alabama, the Employers' Liability Act does not prescribe a period of limitation, but leaves the action subject to the terms of the general statute of limitations, it would seem that the exceptions and saving clauses in that statute would also apply to actions under the Employers' Liability Act.[2]

Where, however, the Employers' Liability Act sued upon prescribes a period of limitation without any saving clauses, it seems that the plaintiff is not entitled to the benefit of a saving clause in the general statute

[1] Selma &c. Ry. *v.* Lacy, 49 Ga. 106.

[2] Louisville &c. Ry. *v.* Sanders, 86 Ky. 259; Nelson *v.* Galveston &c. Ry., 78 Tex. 621.

of limitations. Thus, it has been held in Mississippi that an infant suing under the Mississippi act for the negligent killing of its father by the defendant railroad company must bring the action within the year mentioned in that statute, and is not entitled to the benefit of a saving clause in the general statute of limitations allowing infants who are not represented by any guardian, etc., further time to sue.[1]

It is well settled that the fact that a saving clause in a statute of limitations allows a new suit to be brought within a year after a nonsuit, or reversal, etc., of a former suit which was brought in time, does not allow such a second suit on a policy of insurance which limits the first suit to one year and makes no provision for a second suit.[2]

§ 137. *Conflict of Laws.*

In statutes of this character, which create a new legal right unknown to the common law, time is regarded as of the essence of the right. The provision, that no action shall be maintained unless brought within a certain time after the injury, is a condition attached to the right of action, and it operates as a limitation of the liability as created, and not merely of the remedy. When the action is brought after the expiration of the time limited it is barred, not only in the State of injury,

[1] Foster *v.* Yazoo &c. Ry. (Miss.), 18 So. Rep. 380. See, also, Taylor *v.* Cranberry Iron Co., 94 N. C. 525; Best *v.* Kinston, 106 N. C. 205; Cavanagh *v.* Ocean Steam Nav. Co., 19 N. Y. Civ. Pro. 391; Hill *v.* Supervisors, 119 N. Y. 344.

[2] Riddlesbarger *v.* Hartford Ins. Co., 7 Wall. 386; Wilson *v.* Ætna Ins. Co., 27 Vt. 99; Hocking *v.* Howard Ins. Co., 130 Pa. St. 170; Arthur *v.* Homestead Ins. Co., 78 N. Y. 462.

but also in other States and in the federal courts. In the case of The Harrisburg, 119 U. S. 199, the plaintiff's husband was killed in a collision on navigable waters within the jurisdiction of Massachusetts in 1877. The suit, which was *in rem* against the negligent steamer, The Harrisburg by name, was brought in 1882, in the District Court of the United States for Pennsylvania. Both the States of Massachusetts and Pennsylvania had statutes allowing actions for the negligent killing of a human being in certain cases, but they both required the action to be brought within one year after the injury in Massachusetts, and within one year after the death in Pennsylvania. It was held that the action could not be maintained, for the following reasons, stated by Mr. Chief Justice Waite on page 214: —

"The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year; and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded.

The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

The fact that in The Harrisburg, *supra*, the action was barred under the statute of the State of process was immaterial. The mere fact that it was barred under the statute of the State of injury was sufficient to prevent a recovery. Thus, in Boyd *v.* Clark, 8 Fed. Rep. 849, a like action, brought in a federal court sitting in Michigan for an injury received in Ontario after the time limited by the Ontario statute, was held to be barred, although the time prescribed by the Michigan statute had not elapsed. In delivering the court's opinion, Mr. Justice Brown says, on page 852: "The true rule I conceive to be this: that where a statute gives a right of action unknown to the common law, and, either in a proviso to the section conferring the right or in a separate section, limits the time within which an action shall be brought, such limitation is operative in any jurisdiction where the plaintiff may sue." [1]

§ 138. *Same.*

When the statute of the State of injury allows a longer period for the commencement of suit than is allowed by the State of process, the same principle is applied in favor of the plaintiff. That is, the plaintiff may maintain his action if the time limited by the statute of the State of injury has not elapsed, even if

[1] See, also, Selma &c. Ry. *v.* Lacy, 49 Ga. 106; O'Shields *v.* Georgia Pacific Ry., 83 Ga. 621, 626; Halsey *v.* McLean, 12 Allen (Mass.), 438, 443; Eastwood *v.* Kennedy, 44 Md. 563; Phillips *v.* Eyre, L. R. 6 Q. B. 1.

the time limited by the statute of the State of process has elapsed.

Thus, in Therough *v.* Northern Pacific Ry., 64 Fed. Rep. 84, the plaintiff's intestate, a locomotive engineer for defendant, was killed in Montana on October 20, 1890. The Montana "Damage Act" (Comp. St. Mont. 1887, §§ 981, 982) allowed three years for the bringing of such an action. The suit, however, was brought in Minnesota, whose "Damage Act" allowed only two years for such suits, on October 10, 1893, — more than two years, but less than three years, after the injury. It was held, by the Circuit Court of Appeals for the Eighth Circuit, that the action was not barred, and that it was governed by the law of Montana, following the principle of Boyd *v.* Clark, 8 Fed. Rep. 849.

In delivering the opinion, Mr. Justice Thayer says, on page 86: "It must be accepted, therefore, as the established doctrine, that where a statute confers a new right, which by the terms of the act is enforcible by suit only within a given period, the period allowed for its enforcement is a constituent part of the liability intended to be created, and of the right intended to be conferred. The period prescribed for bringing suit in such cases is not like an ordinary statute of limitations, which merely affects the remedy. It follows, of course, that if the courts of another State refuse to permit the cause of action to be sued upon during a part of the period limited by the foreign law, to that extent they refuse to give effect to the foreign law, and by so doing impair the right intended to be created."

§ 139. *Same. When Employers' Liability Act does not limit Time for Action.*

The Alabama Employers' Liability Act does not prescribe a definite time within which an action under it must be brought. This is regulated by the general statute of limitations, which fixes the limitation upon actions for "any injury to the person or rights of another not arising from contract" at one year.[1]

In Georgia the period for such actions is two years. In an action brought in Georgia under the Alabama Employers' Liability Act for an injury received in Alabama, it appeared that the action was brought within two years, but not within one year, after the injury. It was held that the action was not barred, for the reason that, as the Alabama Employers' Liability Act failed to prescribe a limitation, the action was governed by the *lex fori*.[2] In delivering the court's opinion, Mr. Chief Justice Bleckley says, on page 625: "Where torts are committed in foreign countries, or beyond the territorial jurisdiction of the sovereignty in which the action is brought, the *lex fori* governs, no matter whether the right of action depends upon the common law or a local statute, unless the statute which creates or confers the right limits the duration of such right to a prescribed time."

It seems that the parties must have remained within the jurisdiction of the State of injury for its full period of limitation in order to bar the action in another State.

[1] Alabama Code of 1886, § 2619, cl. 6; O'Kief *v.* Memphis &c. Ry., 99 Ala. 524.

[2] O'Shields *v.* Georgia Pacific Ry., 83 Ga. 621.

In Canadian Pacific Ry. *v.* Johnson, 61 Fed. Rep. 738, decided by the Circuit Court of Appeals in 1894, the plaintiff, while in the employ of the defendant, was injured in Canada on September 6, 1890. This action was brought on November 6, 1891, more than a year after the injury. By the Code of Canada the right of action for such an injury was "absolutely extinguished" in one year. At the time of the injury the plaintiff was a citizen of Vermont. From the time of his injury on September 6, 1890, he remained in Canada until April, 1891, less than a year, and then returned to Vermont. The railway company was a Canadian corporation. It was held that, even assuming the Canadian statute to be one which extinguished a right of action, the action was not barred, because the plaintiff had not remained in Canada for the full period of one year, and therefore the statute had not fully operated upon the right.

§ 140. *Same. When Right exists at Common Law.*

When the right of action does not depend upon statute but exists at common law, the rule generally recognized is that an action for personal injuries received without the State of process, as well as within that State, is governed by its limitation laws.[1]

[1] Johnston *v.* Canadian Pacific Ry., 50 Fed. Rep. 886; Munos *v.* Southern Pacific Ry., 51 Fed. Rep. 188; Nonce *v.* Richmond Co., 33 Fed. Rep. 429; Finnell *v.* Southern Kans. Ry., 33 Fed. Rep. 427.

CHAPTER XI.

THE MEASURE OF DAMAGES.

Section
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§ 141. *Injury not resulting in Death.*

The Massachusetts statute limits the amount of damages recoverable by an employee when his injury does not result in death to a sum not exceeding four thousand dollars.[1] It does not prescribe any criterion for estimating the amount, but leaves the question to be settled upon general principles of law. By virtue of the various Married Women's Acts, it has recently

[1] Mass. St. 1887, ch. 270, § 3.

been decided that the impairment of a married woman's capacity to labor caused by a personal injury is an element of damage in her favor, and not in her husband's favor, and may be considered by the jury in an action by her against the negligent person.[1] The Colorado statute declares that the compensation "shall not exceed the sum of five thousand dollars."[2]

Where the employer has contributed to an insurance fund for the benefit of employees, the Massachusetts act further provides that he "may prove, in mitigation of the damages recoverable by an employee under this act, such proportion of the pecuniary benefit which has been received by such employee from any such fund or society, on account of such contribution of said employer, as the contribution of such employer to such fund or society bears to the whole contribution thereto."[3]

The English statute provides that "the amount of compensation recoverable under this act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury."[4] By section 5 of this act the amount of any penalty paid to the injured employee under any other statute is to be deducted from the compensation recovered under the Employers' Liability Act.

[1] Harmon *v.* Old Colony Ry., 165 Mass. 100; 42 N. E. Rep. 505.
[2] Colo. Laws of 1893, ch. 77, § 2.
[3] Mass. St. 1887, ch. 270, § 6.
[4] 43 & 44 Vict. cap. 42, § 3.

The Alabama statute does not prescribe a limit to the amount of damages recoverable in an action under the statute. In Mobile &c. Ry. *v.* George, 94 Ala. 199, a brakeman recovered a verdict of $19,547 for the loss of both feet. In the same case, the court, by Mr. Justice Clopton, says on page 222: "Where the injury is permanent, the plaintiff, in actions of this character, may recover compensation for the disabling effects of the injury, past and prospective. In estimating the damages, the loss of time, and the incapacity to do as profitable labor as before the injury, as well as the mental and physical suffering caused by it, are pertinent and legitimate factors."[1]

§ 142. *Injury resulting in Death preceded by Conscious Suffering, or in Death which is not Instantaneous.*

In this case the Massachusetts act, as amended by the statute of 1892, ch. 260, § 1, provides that —

"The total damages awarded hereunder, both for said death and said injury, shall not exceed five thousand dollars, and shall be apportioned by the jury between the legal representatives and the persons, if any, entitled under the succeeding section of this act to bring an action for instantaneous death. If there are no such persons, then no damages for such death shall be recovered; and the damages, so far as the same are awarded for said death, shall be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable."

[1] Citing South Alabama Ry. *v.* McLendon, 63 Ala. 266; Alabama &c. Ry. *v.* Yarbrough, 83 Ala. 238, 241.

Under the original Massachusetts act of 1887, the employer was liable in damages for the conscious suffering of the deceased employee, but was not liable in addition thereto for his death as a substantive cause of action.[1] The amendment of 1892, therefore, introduced a new element of damage.

§ 143. *Injury resulting in Instantaneous Death, or in Death not preceded by Conscious Suffering.*

The Massachusetts statute of 1892, ch. 260, § 2, provides that —

"In case of death which follows instantaneously, or without conscious suffering, compensation in lieu thereof [of damages] may be recovered in not less than five hundred and not more than five thousand dollars, to be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable."

Under a statute providing that injuries to the person shall survive to the personal representative, the plaintiff can recover only such damages as he proves were sustained by the deceased. A conjecture that he suffered mental or other pain is not sufficient. Thus, in Kennedy *v.* Standard Sugar Refinery, 125 Mass. 90, the deceased, while engaged in wheeling coal for the defendant, fell from a platform twenty feet to the ground. He immediately became unconscious, and remained so until his death, thirty-six hours afterwards. It was held in an action at common law that his administratrix could not recover damages for the mental or other suffering endured by him during the fall, because there

[1] Ramsdell *v.* New York &c. Ry., 151 Mass. 245.

was no proof that he suffered during that time, and that the jury was not warranted in inferring that he suffered.

§ 144. "*Assessed with Reference to the Degree of Culpability.*"

These words indicate that there must be some degree of culpability on the part of the employer, or of the person for whose negligence he is made liable.

The same language is used in § 212 of Massachusetts Public Statutes, ch. 112, relating to the liability of railroad corporations for an injury resulting in death. Under this statute it has been held that a railroad is not liable for the defective condition of the roadbed of a road operated but not owned by it, unless it had notice of the defect, or might have had notice of it by the exercise of due care, because there is no culpability on its part.[1]

In reference to a similar statute Mr. Justice Metcalf for the court says in Carey *v.* Berkshire Ry., 1 Cush. 475, 480: "And as this penalty is to be recovered by indictment,[2] it is doubtless to be greater or smaller, within the prescribed maximum and minimum, according to the degree of blame which attaches to the defendants, and not according to the loss sustained by the widow and heirs of the deceased. The penalty, when thus recovered, is conferred on the widow and heirs, not as damages for their loss, but as a gratuity from the Commonwealth."

[1] Littlejohn *v.* Fitchburg Ry., 148 Mass. 478.

[2] The fact that the penalty is recovered by indictment instead of by a civil action seems immaterial upon the question of the measure of damages. Doyle *v.* Fitchburg Ry., 162 Mass. 66, 71.

Where there is a series of negligent acts, the earlier acts conducing to and furnishing occasion for the later acts, the jury, in determining the degree of culpability of the defendant corporation for causing the death of the intestate, is not confined to a consideration of the act which immediately produced the death, but may consider the whole chain or series of acts, and assess damages accordingly.[1]

§ 145. *In Alabama, Damages are limited to the Pecuniary Loss or Injury.*

In Alabama the Employers' Liability Act contains no criterion for estimating damages. In case the injury results in death, the damages recovered are "distributed according to the statute of distributions."[2] In such case the Supreme Court has held that the measure of damages is limited to the pecuniary loss or injury sustained by the person entitled to receive the damages, and that no damages can be recovered on account of the pain and suffering of the deceased, the grief and distress of his family, or the loss of his society.[3] The reason assigned by the court in the first case just cited is as follows: "The theory of the statute is, that those for whom compensation is provided have a pecuniary interest in the life of the person killed, and consequently the amount of the recovery is limited to the value of such interest."[4]

In delivering the court's opinion in Louisville &c.

[1] Kansas City &c. Ry. *v.* Sanders, 98 Ala. 293.

[2] Alabama Code, § 2591.

[3] Louisville &c. Ry. *v.* Orr, 91 Ala. 548; James *v.* Richmond &c. Ry., 92 Ala. 231.

[4] Per Coleman, J., p. 552.

Ry. *v.* Orr, 91 Ala. 548, 553, Mr. Justice Coleman says: —

"The jury have no arbitrary discretion to give as damages what they may see proper, without reference to a proper basis from which to estimate them. That the jury may have proper data from which a pecuniary compensation may be fixed, it is proper to admit evidence of the age, probable duration of life, habits of industry, means, business, earnings, health, skill of the deceased, reasonable future expectations; and perhaps there are other facts which should exert a just influence in determining the pecuniary damage sustained. In proportion as all the relevant facts and circumstances of decedent's condition are brought before the jury, they will be the better prepared to ascertain correct compensation. If none of the facts and circumstances, except the bare killing and age of decedent, are in evidence, the verdict for other than nominal damages would be purely conjectural."

In the later case of James *v.* Richmond &c. Ry., 92 Ala. 231, 236, the court mentioned two additional elements of damage, namely, the net income and habits of economy of the deceased, which were said to be important factors in ascertaining his accumulating capacity.[1]

In the same case it was held that an administratrix was entitled to recover substantial damages where it appeared in evidence that the deceased was 22 or 23 years of age, of good health, probable duration of life thirty-nine or forty years, occupation a brakeman on a freight train, average earning capacity $30 or $35 per month.

[1] See, also, Richmond &c. Ry. *v.* Hammond, 93 Ala. 181.

§ 146. *When Deceased Employee is a Minor.*

In an action under the Alabama act, for causing the death of a minor employee, his personal representative is not entitled to recover damages for the earnings of the deceased during his minority, when he lived with and was supported by his father prior to his death.[1] Such damages belong to the father, and may be recovered by him in a separate action, and they should, therefore, be excluded by the jury in estimating the damages in an action brought by his executor or administrator.[1]

§ 147. *Age, Health, Strength, Capacity to earn Money, and Family of Deceased, as Elements of Damage.*

In Baltimore &c. Ry. *v.* Mackey, 157 U. S. 72, an inspector and repairer of cars, in the employ of the defendant railroad company, was killed by its negligence in the District of Columbia. The Act of Congress, approved February 17, 1885, ch. 126 (23 Stat. 307), provided that the damages not exceeding $10,000 for such death, "shall be assessed with reference to the injury resulting from such act, neglect, or default, causing such death, to the widow and next of kin of such deceased person;" and further provided, by section 3, "that the damages recovered in such action shall not be appropriated to the payment of the debts or liabilities of such deceased person, but shall inure to the benefit of his or her family, and be distributed according to

[1] Alabama Coal Co. *v.* Pitts, 98 Ala. 285; Williams *v.* South & North Alabama Ry., 91 Ala. 635.

the provisions of the statute of distributions in force in the said District of Columbia." In delivering the opinion of the court, Mr. Justice Harlan says, on page 93: "Under such a statute, it is entirely proper that the jury should take into consideration the age of the deceased, his health, strength, capacity to earn money, and family. The injury done to a family consisting of a widow and helpless young children, who depended for support entirely upon the labor of a husband and father whose death was caused by the wrongful act of others, is much greater than would be done to any 'next of kin' able to maintain themselves, and who have never depended, and had no right to depend, upon the labor or exertions of the deceased for their maintenance."

The case was distinguished from that of Pennsylvania Co. *v.* Roy, 102 U. S. 451, in which a person was injured but not killed, and in which it was held that his poverty, and the number and ages of his children, were not proper elements of damage.

§ 148. *When the Deceased leaves a Widow or Dependent Next of Kin.*

If the employee's death was not instantaneous, but was preceded by conscious suffering, and he leaves a widow or dependent next of kin, his legal representative, under the Massachusetts act as amended, may recover damages, not exceeding $5,000, both for his pain and suffering, and also for the death itself as a substantive cause of action. The jury is empowered in such an action by the executor or administrator to apportion the damages between him and the widow or dependent next of kin; and it is further provided that

"the damages, so far as the same are awarded for said death, shall be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable." [1]

If the employee is instantly killed, or dies without conscious suffering, his widow or dependent next of kin, under the Massachusetts statute, may recover damages "in the same manner, to the same extent, as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered." [2]

In Louisville &c. Ry. *v.* Trammell, 93 Ala. 350, the court, by Mr. Justice McClellan, says on page 354: "The measure of damages, in all cases where suit is for injuries causing the death of an employee, is the pecuniary value of the life of the employee to his next of kin, resulting either from a relation of dependency, or from expectation of benefit from the distribution of such estate as it may be inferred from the evidence he would have earned and saved but for untimely death." In the same case it appeared that the probable duration of life of the deceased was twenty-seven years; that his earning capacity was $300 per year; that he saved nothing; and that he left a widow only and no children. It was held that the measure of damages was such a sum as, if put at legal interest, would yield the widow an annual income of $150 for twenty-seven years, and exhaust the principal at the end of that period.[3] This sum the court determined to be approx-

[1] Mass. St. 1892, ch. 260, § 1.

[2] Mass. St. 1887, ch. 270, § 2.

[3] It would seem that one element of damages should be, at least in the case of a young man, his prospective increase in earning and saving capacity. The case cited above fails to recognize this consideration. In

imately $1,650; and the case having been tried without a jury in the lower court, the Supreme Court, under its power to render such judgment as the trial court should have rendered, reduced the judgment from $2,500 to $1,650.

In Bromley *v.* Birmingham Ry., 95 Ala. 397, it was held that the fact that the deceased employee left surviving him a wife and minor child dependent upon him for support, without proof that he expended his earnings wholly or in part upon them or for their benefit, cannot affect the measure of damages or strengthen the right of recovery. "Where the relation of dependency exists, and the proof shows expenditure for their benefit, the measure of recovery as affected by this proof is declared in the case of Louisville &c. Ry. *v.* Trammell, 93 Ala. 350. If the income exceed the outlay, so that there is a regular accumulation in excess of consumption, the rule is declared in McAdory *v.* Louisville &c. Ry., 94 Ala. 272."[1]

Farmers' Loan Co. *v.* Toledo &c. Ry., 67 Fed. Rep. 73, "the increased earning capacity that would come with additional experience" was recognized by the special master as a proper element of damage in the case of an employee of the age of thirty years who was killed through the defendant's negligence. Page 81. Although Ricks, J., reduced the master's finding from $11,606 to $10,000, he did it for the reason that the legislatures of a large number of States have fixed $10,000 as the maximum limit in case of death by wrongful act, and not on the ground that an employee's probable increase in earning capacity was an improper element of damage.

[1] Per Coleman, J., for the court, p. 406.

§ 149. *When the Deceased leaves No Widow or Dependent Next of Kin.*

In Massachusetts, if there was conscious suffering on the part of the deceased employee, and he leaves no widow or dependent next of kin, no damages for the death itself can be recovered under the Employers' Liability Act;[1] but the executor or administrator may recover damages for his mental and physical suffering, as assets of the estate.[2]

If the death was instantaneous, or without conscious suffering, the measure of damages is "not less than five hundred and not more than five thousand dollars, to be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable."[3]

In Alabama, where the deceased employee leaves no next of kin entitled to inherit under the statute of distributions, only nominal damages can be recovered under the Employers' Liability Act. In a suit by the personal representative, however, he need not allege or prove that the deceased left next of kin, as the want of next of kin is merely matter of defence.[4]

In the case of McAdory *v.* Louisville &c. Ry., 94 Ala. 272, there were net earnings, or savings, but no relation of dependence. The deceased was a switchman on a railroad, at a monthly salary of $66.66; age, 21 years; unmarried; sober and healthy, and of indus-

[1] Mass. St. 1892, ch. 260, § 1.
[2] Ramsdell *v.* New York &c. Ry., 151 Mass. 245.
[3] Mass. St. 1892, § 2.
[4] James *v.* Richmond &c. Ry., 92 Ala. 231.

trious and economical habits; expectancy of life, about forty years. It was held, in an action by his personal representative under the Employers' Liability Act, that the true measure of damages was not the aggregate amount of his net earnings during the probable duration of his life, estimated on the basis of his health, ability to labor, habits of sobriety, industry, and economy, gross annual earnings and expenditures, but such a sum as, estimated on that basis, with legal interest added, would aggregate that amount, calculated by the American mortuary tables. A verdict for the plaintiff for $9,395.95 having been set aside by the trial judge as excessive, the Supreme Court held that such action was proper and affirmed the judgment, without attempting to fix the amount of damages, as it might have done if the trial had been without a jury.[1] The rule announced by the Supreme Court of Texas, in Houston &c. Ry. *v.* Cowser, 57 Texas, 293, 304, is quoted with approval on page 276, namely: "Perhaps the nearest measure of damages approximating this reasonable certainty would be such sum as would purchase an annuity if such security was in the market, equal to the value of the pecuniary aid which the plaintiff would have derived from the deceased, calculated upon the basis of all the facts and circumstances of the particular case reasonably accessible in evidence, and including the probable duration of life, as shown by the approved tables."

In an action under the Alabama Employers' Liability Act, it was held that the fact that the deceased employee was suffering from pulmonary disease at the time of his

[1] Louisville &c. Ry. *v.* Trammell, 93 Ala. 350.

injury is admissible in evidence for the defendant, as affecting his probable continuance in life.[1]

§ 150. *Colorado Rules.*

In an action under the Colorado act of 1877, giving a right of action for death caused by negligence, the measure of damages has been thus described by the Supreme Court of Colorado in Pierce *v.* Conners, 20 Colo. 178, 182; 37 Pac. Rep. 721, 722: "The true measure of compensatory relief in actions of this kind, under the act of 1877, *supra*, is a sum equal to the net pecuniary benefit which plaintiff might reasonably have expected to receive from the deceased in case his life had not been terminated by the wrongful act, neglect, or default of the defendant. Such sum will depend on a variety of circumstances and future contingencies, and will therefore be difficult of exact ascertainment; but the damages to be awarded in each case may be approximated by considering the age, health, condition in life, habits of industry or otherwise, ability to earn money, on the part of the deceased, including his or her disposition to aid or assist the plaintiff. Not only the kinship or legal relation between the deceased and the plaintiff, but the actual relations between them, as manifested by acts of pecuniary assistance rendered by the deceased to the plaintiff, and also contrary acts, may be taken into consideration."[2]

[1] Columbus &c. Ry. *v.* Bridges, 86 Ala. 448.

[2] See, also, Moffatt *v.* Tenney, 17 Colo. 189; Hayes *v.* Williams, 17 Colo. 465, 468; Denver &c. Ry. *v.* Wilson, 12 Colo. 20.

§ 151. *Other Cases.*

For other cases involving the measure of damages for injuries resulting in death, in actions brought under the American prototypes of Lord Campbell's Act, see the cases cited in the note.[1]

§ 152. *Exemplary or Punitive Damages.*

In Alabama it has been decided, in an action under its Employers' Liability Act, that such damages are not recoverable where the injury results in death.[2] The statute does not limit the amount of damages recoverable, and the measure of damages is determined upon common-law principles. Even when the negligence of the defendant or of his employees is so gross or wanton as to overcome the defence of contributory negligence, no damages beyond the point of compensation can be recovered by the personal representative.[3]

Whether a like rule applies when the injury does not result in death, and the injured employee himself brings the action, seems to be doubtful.[4]

In a case at common law decided in 1879 it was held that exemplary or punitive damages were recoverable for personal injuries caused by negligence, if the negligence was gross; and that the degree of negligence

[1] Railroad Co. *v.* Barron, 5 Wall. 90 ; Chicago &c. Ry. *v.* Harwood, 88 Ill. 88 ; Huntingdon &c. Ry. *v.* Decker, 84 Pa. 419 ; Kesler *v.* Smith, 66 N. C. 154 ; Telfer *v.* Northern Ry., 30 N. J. L. 188.

[2] Louisville &c. Ry. *v.* Orr, 91 Ala. 548 ; Columbus &c. Ry. *v.* Bridges, 86 Ala. 448.

[3] Louisville &c. Ry. *v.* Trammell, 93 Ala. 350.

[4] Seaboard Manuf. Co. *v.* Woodson, 98 Ala. 378.

is a question for the jury to determine, under proper instructions from the court.[1]

In Massachusetts exemplary and vindictive damages are probably not recoverable.[2]

In Connecticut it has been held, in an action under a statute resembling Lord Campbell's Act, that such damages are recoverable.[3]

§ 153. *Excessive Damages: how reduced.*

Under the Massachusetts practice, the presiding judge, when the damages awarded by the jury appear to him to be excessive, "may either grant a new trial absolutely, or give the plaintiff the option to remit the excess, or a portion thereof, and order the verdict to stand for the residue."[4] A like rule prevails in Alabama and generally elsewhere.[5]

A verdict of $5,000 is not excessive where the employee at the time of his injury was forty-seven years old and earning fifty dollars a month, and suffered a painful fracture of the ankle, which his physician testified would probably result in a permanent disability.[6]

When the trial is without a jury, the Supreme Court of Alabama sitting *in banc* has the power to reduce the damages found by the trial judge, if they appear to be

[1] South Alabama Ry. *v.* McLendon, 63 Ala. 266. See, also, Barbour County *v.* Horn, 48 Ala. 566; Mobile &c. Ry. *v.* Ashcraft, 48 Ala. 15.

[2] Higgins *v.* Central New England Ry., 155 Mass. 176, 181; Barnard *v.* Poor, 21 Pick. 378; Austin *v.* Wilson, 4 Cush. 273.

[3] Linsley *v.* Bushnell, 15 Conn. 225; Beecher *v.* Derby Bridge Co., 24 Conn. 491, 497; Murphy *v.* New York &c. Ry., 29 Conn. 496.

[4] Doyle *v.* Dixon, 97 Mass. 208, 213, per Gray, J.; Lambert *v.* Craig, 12 Pick. 199; Blunt *v.* Little, 3 Mason, 102, 107.

[5] Stephenson *v.* Mansony, 4 Ala. 317.

[6] Richmond &c. Ry. *v.* Farmer, 97 Ala. 141.

excessive, and to enter judgment for the reduced amount without granting a new trial, and without a remitter by the plaintiff.[1]

§ 154. *Division of Damages when Employee's Negligence has contributed to his Injury.*

In the admiralty courts, where an employee is injured on board ship through a marine tort arising partly from the negligence of the ship's officers and partly from his own negligence, the fact that his own negligence contributed to his injury does not prevent a recovery, — it only causes a division of damages and a reduction in the amount recoverable.[2]

In the common-law courts, however, contributory negligence on the part of an employee will prevent a recovery of any damages, even when the injury occurred on board ship partly through the negligence of its officers.[3] But the mere fact that the plaintiff aggravates his injury after it is received by his negligent conduct will not prevent him from recovering for the original injury inflicted by the defendant's negligence.[4]

[1] Louisville &c. Ry. *v.* Trammell, 93 Ala. 350.

[2] The Max Morris, 137 U. S. 1 ; The Julia Fowler, 49 Fed. Rep. 277.

[3] Kalleck *v.* Deering, 161 Mass. 469, 472. That contributory negligence prevents a recovery under the Employers' Liability Acts, see §§ 113–122.

[4] Hibbard *v.* Thompson, 109 Mass. 286 ; Owens *v.* Baltimore &c. Ry., 35 Fed. Rep. 715 ; Gould *v.* McKenna, 86 Pa. St. 297 ; Hathorn *v.* Richmond, 48 Vt. 557.

§ 155. *Remote or Conjectural Damages.*

Under the Alabama statute for the death of a minor employee, it has been decided that the probability of his marrying and having children, if he had lived, is too remote and conjectural to be considered by the jury in estimating the amount of recovery.[1]

Tennessee Coal Co. *v.* Herndon, 100 Ala. 451.

CHAPTER XII.

DIRECTING A NONSUIT OR VERDICT FOR DEFENDANT.

I. *Defendant's Negligence.*

Section
156. Subdivisions of subject and preliminary remarks.
157. Is mere happening of accident *prima facie* evidence of negligence? (1) Actions by non-employees at common law.
158. Same. (2) Common-law rule in actions by employees.
159. Slight evidence sufficient, but not mere scintilla.
160. Automatic starting of machinery.
161. Inference against defendant when he introduces no evidence.
162. What amounts to a "defensive explanation" of the injury.
163. Actions under Employers' Liability Acts. Subdivisions of subject.
164. (*a*) Defects in the ways, works, machinery, or plant.
165. Same.
166. (*b*) Negligence of a superintendent.
167. Same.
168. (*c*) Negligence of a person in charge or control of any signal, switch, locomotive engine, or train upon a railroad.
169. Same.

§ 156. *Subdivisions of Subject and Preliminary Remarks.*

One of the most difficult questions relating to suits under Employers' Liability Acts is, What evidence is or is not sufficient to entitle the plaintiff to go to the jury? or, in other words, What evidence will or will not authorize the trial judge in nonsuiting the plaintiff, or in directing the jury to return a verdict for the defendant? This question will be discussed under the following subdivisions: —

I. Defendant's Negligence.
II. Plaintiff's Contributory Negligence.[1]
III. Assumption of Risk, and *Volenti non fit Injuria*.[2]

In Gardner *v.* Michigan Central Ry., 150 U. S. 349, 361, Mr. Chief Justice Fuller, speaking for the court, says: "The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them, or, in other words, a case should not be withdrawn from the jury unless the conclusion follows, as matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish." [3]

"It is not a question of the weight of evidence, or whether the verdict ought not to be set aside on a motion for a new trial. When the question is raised by exceptions, the only inquiry is, whether there is any evidence proper to submit to the jury as having a tendency to support the legal propositions which charge the defendant with liability." [4] "The first inquiry is whether there was any evidence on behalf of the plaintiff upon which the jury could legally have found a verdict in his favor. If there was, the question of its weight or value cannot be considered by us." [5]

[1] Ch. xiii. §§ **170–173**, *post.*

[2] Ch. xiv. §§ **174–190**, *post.*

[3] See, also, Baltimore &c. Ry. *v.* Mackey, 157 U. S. 72; Grand Trunk Ry. *v.* Ives, 144 U. S. 408, 417, and cases cited; Hall *v.* Posey, 79 Ala. 84; Pennsylvania Ry. *v.* Ogier, 35 Pa. St. 60; Gaynor *v.* Old Colony Ry., 100 Mass. 208, 212; Marietta &c. Ry. *v.* Picksley, 24 Ohio St. 654; Jamison *v.* San José &c. Ry., 55 Cal. 593.

[4] Ford *v.* Fitchburg Ry., 110 Mass. 240, 260, per Colt, J., for the court, citing Forsyth *v.* Hooper, 11 Allen, 419.

[5] Taylor *v.* Carew Manuf. Co., 140 Mass. 150, 151, per Devens, J., citing Heywood *v.* Stiles, 124 Mass. 275.

In Louisville &c. Ry. *v.* Allen, 78 Ala. 494, 502, Mr. Justice Somerville, in delivering the opinion, says: "The question of negligence is one of fact for the determination of the jury in cases of doubt, either where the facts are disputed or where different minds may reasonably draw different inferences or conclusions. It is a question of law, however, to be decided by the court, where the facts are undisputed and the inference to be drawn from them is clear and certain.[1] The court will, accordingly, give a general charge on the evidence when requested, where the evidence bearing on the question of negligence *vel non* is such as that the court would feel authorized to sustain a demurrer to it." [2]

Where the evidence is conflicting, the circumstance that the presiding justice is clearly of the belief that the question should be decided in one way does not justify him in directing a verdict for the party in whose favor that belief operates, though it would justify him in granting a new trial if the jury found for the other party.[3]

The circumstance that the facts of the case are undisputed is not always sufficient to justify the presiding judge in withdrawing the case from the jury and directing a verdict for one of the parties. In an action for negligence causing personal injury, the question whether either or both of the parties are at fault is for the jury, unless the general knowledge and experience

[1] Citing Montgomery *v.* Wright, 72 Ala. 411.

[2] Citing Smoot *v.* Mobile &c. Ry., 67 Ala. 13.

[3] Chambliss *v.* Mary Lee Coal Co., 103 Ala. 000; 16 So. Rep. 572.

of men at once condemn the conduct of one of them as careless, or there is no evidence of negligence.[1]

§ 157. *Is Mere Happening of Accident Prima Facie Evidence of Negligence?* (1) *Actions by Non-employees at Common Law.*

In actions by travellers and others who are not employees of the defendant, it has been repeatedly decided that proof that the plaintiff was injured on the defendant's premises, or by some cause originating on his premises, is, in the absence of a defensive explanation, sufficient *prima facie* evidence of defendant's negligence to entitle the plaintiff to go to the jury.[2] The grounds of these decisions are that the defendant is liable to such persons for the negligence of his employees as well as for that of himself; and that, as the premises are under the exclusive management and control of the defendant or his employees, the injury is more naturally to be attributed to his or their acts

[1] Kerrigan *v.* West End Ry., 158 Mass. 305; Lane *v.* Atlantic Works, 107 Mass. 104.

[2] Feital *v.* Middlesex Ry., 109 Mass. 398; White *v.* Boston & Albany Ry., 144 Mass. 404; Thomas *v.* Western Union Telegraph Co., 100 Mass. 156; Hicks *v.* New York &c. Ry., 164 Mass. 424; Howser *v.* Cumberland &c. Ry., 80 Md. 146; s. c., 27 L. R. A. 154; Stokes *v.* Saltonstall, 13 Peters, 181; Gleeson *v.* Virginia Midland Ry., 140 U. S. 435; Rose *v.* Stephens Transportation Co., 11 Fed. Rep. 438; Judson *v.* Giant Powder Co., 107 Cal. 549; 40 Pac. Rep. 1020; Dixon *v.* Pluns, 98 Cal. 384; Volkmar *v.* Manhattan Ry., 134 N. Y. 418; Mullen *v.* St. John, 57 N. Y. 567; Cummings *v.* National Furnace Co., 60 Wis. 603; Kirst *v.* Milwaukee &c. Ry., 46 Wis. 489; Iron Ry. *v.* Mowery, 36 Ohio St. 418; Ryder *v.* Kinsey, 59 Minn. 000; 64 N. W. Rep. 94; Scott *v.* London Docks Co., 3 H. & C. 596; Carpue *v.* London &c. Ry., 5 Q. B. 747; Kearney *v.* London &c. Ry., L. R. 6 Q. B. 759. *Contra,* Walker *v.* Chicago &c. Ry., 71 Iowa, 658.

than to the act of a stranger, and his means or sources of knowledge are superior to those of the plaintiff. Unless, therefore, the defendant explains the accident by proof that it was caused by a stranger or by some other cause for which he is not responsible, the plaintiff is entitled to go to the jury, and a verdict in his favor will stand.

Although this rule modifies the rule relating to the burden of proof, it does not cast the burden on the defendant: the plaintiff still retains the burden of showing that the defendant's negligence caused his injury. Such evidence, however, on the part of the plaintiff is not conclusive in his favor, nor is he entitled to a ruling to that effect. It should be taken into consideration by the jury and allowed such weight only as they think reasonable. Hence, if they return a verdict for the defendant, it will not be set aside because the presiding judge refused to rule that it was conclusive evidence, or that it changed the burden of proof.[1]

It has been decided by the courts of some jurisdictions that this presumption of negligence arises only when there is a contractual relation between the plaintiff and the defendant, such as that of passenger and carrier, and that the doctrine does not apply to persons in other relations.[2] The better view, however, seems to be that the existence of such contractual relation is not essential, and that the presumption arises without it.[3]

[1] Le Barron *v.* East Boston Ferry Co., 11 Allen, 312.

[2] Huff *v.* Austin, 46 Ohio St. 386 ; Young *v.* Bransford, 12 Lea (Tenn.), 232.

[3] Judson *v.* Giant Powder Co., 107 Cal. 549 ; 40 Pac. Rep. 1020 ; Rose *v.* Stephens Transportation Co., 11 Fed. Rep. 438 ; and other cases cited above under the main proposition.

§ 158. *Same.* (2) *Common-Law Rule in Actions by Employees.*

This rule, however, does not apply to actions between employee and employer for personal injuries founded on negligence. As between these two classes of persons, it cannot be affirmed that the employer has the exclusive management or control of the premises, or that his means or sources of knowledge are superior to those of the employee; and it is well settled that the common employer is not liable to one employee for the negligence of a fellow-servant. It is, therefore, generally settled at common law that unless an employee shows more than that he was injured while lawfully engaged on his employer's work or premises, he is not entitled to go to the jury on the question of defendant's negligence, and that a verdict should be directed for the defendant.[1]

In the case of Ouillette *v.* Overman Wheel Co., 162 Mass. 306, the plaintiff, while standing in his place on the floor of defendant's factory, was injured by the falling upon him of shafting and pulleys fastened to beams overhead by two hangers. He contended, and introduced evidence tending to show, that the shaft and the machinery connected with it, and its method of attachment to the floor above, were improper and insecure, and that the defendant ought to have known their unsafe condition. At the trial the defendant requested

[1] Reed *v.* Boston & Albany Ry., 164 Mass. 129; Duffy *v.* Upton, 113 Mass. 544; Nason *v.* West, 78 Me. 253; Toledo &c. Ry. *v.* Moore, 77 Ill. 217; Hudson *v.* Rome &c. Ry., 145 N. Y. 408; 40 N. E. Rep. 8; Mobile &c. Ry. *v.* Thomas, 42 Ala. 672; Louisville &c. Ry. *v.* Allen, 78 Ala. 494; Short *v.* New Orleans &c. Ry., 69 Miss. 848; 13 So. Rep. 826.

the judge to rule that "no burden rests on the defendant to show or explain the cause of the accident." In his charge to the jury the justice stated, on page 309, "that under some circumstances the plaintiff's injury from the breaking of the defendant's machinery, especially where the means of explanation are more likely to be within the control of the defendant than of the plaintiff, is itself evidence of negligence. The breaking of the machinery, in connection with a failure on the part of one who presumably can explain to give explanation, may be evidence of want of care in providing it. But this principle has no application to this case. The injury, though caused by the breaking of the defendant's machinery, is not in itself evidence that the defendant was wanting in due care to provide a reasonably safe place for the plaintiff to do his work in."

The jury returned a verdict for the plaintiff and the defendant excepted. The full court overruled this exception, on the ground that the instruction, that under the circumstances of the case the breaking of the machinery was no evidence of negligence on the defendant's part, was more favorable to the defendant than the ruling requested by it that the defendant was not bound to explain the cause of the accident.

There are, however, some cases of a contrary tendency. In Barnowsky *v.* Helson, 89 Mich. 523, it was held that the falling of a roof of a building which the defendant was engaged in raising, by which the plaintiff's intestate, while in the employ of the defendant, was killed, raised a presumption of negligence on the defendant's part which entitled the plaintiff to go to the jury, in the absence of a defensive explanation by

the defendant showing that the roof fell without his fault. The evidence for the plaintiff tended to show that while the roof was being raised by the defendant under a contract with the owner of the building, by means of jack-screws placed upon boxes made for that purpose, it suddenly slipped or tipped away from the braces, and fell upon the deceased, who was working upon one of the walls of the building. In delivering the court's opinion, Mr. Justice Morse says, on pages 524, 525: "In this case the falling of the roof was in and of itself some evidence that the work of raising it was not being done with the ordinary care and skill. It is true that the mere fact of an injury does not impute negligence on the part of any one; but where a thing happens which would not ordinarily have occurred if due care had been used, the fact of such happening raises a presumption of negligence in some one. For instance, if the wall of a building falls down and injures a person walking along the street or standing beside the building, the clear presumption is that the building was either negligently built, or that it was not kept in a reasonably safe condition after it was erected, since buildings properly constructed do not ordinarily fall of their own weight.[1] In the present case it must be apparent, and within the knowledge of every one, that a roof of this kind could be raised safely, and without falling, if such raising were done with proper care and caution, and by one having the necessary skill and experience to manage the work."[2]

[1] This point was decided in Mullen *v.* St. John, 57 N. Y. 567.

[2] This case is also reported, with note giving many decisions, in 15 L. R. A. 33.

In Mulcairns *v.* Janesville, 67 Wis. 24, it was held that, in an action against a city by one of its employees, the fact that the wall of a cistern, which was in course of construction by the city, fell by its own weight, or through the pressure of earth and gravel behind it placed there by the city, and injured the plaintiff while he was working upon it, raised a presumption of negligence on the part of the defendant.[1]

§ 159. *Slight Evidence Sufficient, but not Mere Scintilla.*

At the same time, it requires but little additional evidence on the part of the employee to turn the scale in his favor and to warrant a verdict for him, on the ground that the employer was negligent.

In Toy *v.* United States Cartridge Co., 159 Mass. 313, the plaintiff, while in the defendant's employ, was injured by the breaking of a punch in a cartridge machine which she was operating. She testified that the second hand had put in a new punch, because she had complained of the old one as scratching; that the second time she used the new one it burst and caused her injuries; that, before she started the machine, she saw a small black mark that extended half-way round the punch about in the middle of it; and that "she did not know what this black mark meant, but that it looked like a knitting-needle that had gone rusty and black." The foreman and the second hand testified that they saw nothing the matter with the punch. It was held that there was sufficient evidence of negligence

[1] See, also, Posey *v.* Scoville, 10 Fed. Rep. 140; Grimsley *v.* Hankins, 46 Fed. Rep. 400.

to warrant a verdict for the plaintiff, and that the case should have been submitted to the jury.[1]

In Graham *v.* Badger, 164 Mass. 42; s. c., 41 N. E. Rep. 61, the plaintiff, while in the defendant's employ, was injured by an iron block falling upon him from a derrick. The fall of the block was due to the breaking of a rope at a point where it had been spliced. The weight attached to the rope was not sufficient to break or to endanger the apparatus if it had been in proper condition. The defendant's evidence, if believed by the jury, tended to show that the breaking of the rope was due to its kinking and being caught in a wheel. At the trial the defendant requested the judge to rule that the mere breaking of the rope was not *prima facie* evidence of negligence on the defendant's part. The judge refused to rule as requested, and instead instructed the jury that, if they found that the rope was defective while in the defendant's care, that fact was evidence which, unexplained, would warrant them in finding that the defendant was negligent. It was held that the refusal to rule as requested by the defendant, and the ruling given, were both correct; that the jury were not bound to believe the explanation offered by the defence if it seemed to them incredible, and that a verdict for the plaintiff was warranted by the evidence; that the jury might infer from the breaking of the rope that it had not been spliced properly, and that this defect might have been discovered by proper inspection, and that the court could not say that the defect was latent or hidden. Although the declaration in this case con-

[1] Other cases to the same effect are: Moynihan *v.* Hills Co., 146 Mass. 586; Spicer *v.* South Boston Iron Co., 138 Mass. 426.

tains counts under the Employers' Liability Act, the reasoning of the court seems to be confined to the common-law count.

On the other hand, a mere scintilla of evidence of negligence on the defendant's part is not sufficient to entitle the plaintiff to go to the jury, either at common law[1] or under the Employers' Liability Act,[2] and it may be so controlled by the defendant's evidence as to justify an instruction to find for the defendant. This is especially true when there is no evidence to connect the defendant's negligence with the injury for which suit is brought.[3]

In Hudson *v.* Rome &c. Ry., 145 N. Y. 408, a fireman of a locomotive was killed by the scorching and consequent collapse, during a trip, of the crown-sheet of the locomotive. His administrator brought this suit against the employer, claiming that the scorching had taken place at some time previous to the trip, and that defendant was negligent in sending the engine out on the road in that condition. The only evidence which tended to support this view was the testimony of the engineer, who stated that he had kept the crown-sheet covered with water throughout the trip, and that it had two full gauges of water over it but a few minutes before the accident. Two experts testified for the defendant that in their opinion, based on an examination of the parts of the locomotive after the accident,

[1] Hudson *v.* Rome &c. Ry., 145 N. Y. 408; 40 N. E. Rep. 8; Nason *v.* West, 78 Me. 253.

[2] Shea *v.* Wellington, 163 Mass. 364; Ross *v.* Pearson Cordage Co., 164 Mass. 257; 41 N. E. Rep. 284; Louisville &c. Ry. *v.* Binion, 98 Ala. 570; Tuck *v.* Louisville &c. Ry., 98 Ala. 150.

[3] Wakelin *v.* London &c. Ry., 12 App. Cases, 41.

the scorching was done at or very near the time of the collapse, and that it was caused by the crown-sheet not being properly covered with water. It was the duty of the engineer to keep the crown-sheet covered with water during the trip. It was held, reversing 26 N. Y. Supp. 386, that the evidence was not sufficient to warrant a verdict for the plaintiff; that the evidence of defendant's negligence was a mere scintilla, which was controlled by the defendant's experts.

§ 160. *Automatic Starting of Machinery.*

In the case of injuries caused by the automatic starting of machinery while the plaintiff is engaged in his ordinary duties, only slight evidence of a defect, or of the employer's negligence, is necessary to establish a *prima facie* case. In Donahue *v.* Drown, 154 Mass. 21, the plaintiff, while cleaning a machine at rest, that being part of her duty, was injured by its automatic starting. "There was evidence that the machine was not put up properly; that the driving-pulley upon the main shaft had a convex surface, instead of a flat surface such as it should have had, and was so fixed with reference to the fixed pulley that the tendency was to draw the belt from the loose pulley when the machine was not in motion on to the fixed pulley, and thus to start the machine."[1] It also appeared that the machine in question, as well as others in the defendant's factory, had previously started automatically. It was held that such evidence would warrant a finding of the defendant's negligence.

[1] This statement of facts is taken from the court's opinion by Lathrop, J., in Ross *v.* Pearson Cordage Co., 164 Mass. 257, 262.

In Mooney *v.* Connecticut River Lumber Co., 154 Mass. 407, the plaintiff was injured by the automatic starting of a carriage connected with a sawing-machine in the defendant's mill. The carriage was run by steam up and down a track. It was undisputed that a machine which would so start was improperly constructed or adjusted, and was unsafe. Three days before the accident the machine had started in the same manner when no one was near it. The defendant's foreman knew this fact, as well as the plaintiff, and the foreman told the plaintiff that it had been repaired, and it had worked perfectly afterwards up to the time of the accident. It was held that the plaintiff was entitled to go to the jury on the question of the defendant's negligence.[1]

The fact, however, that the machine is not supplied with a safety appliance, which would have prevented its automatic starting, although coupled with expert testimony that the machine was dangerous without such safety appliance, will not require its submission to the jury, either at common law or under the Employers' Liability Act.

In Ross *v.* Pearson Cordage Co., 164 Mass. 257; 41 N. E. Rep. 284, the plaintiff, while engaged in cleaning a machine known as a drawing-frame, which was then at rest, had her hand caught in its cog-wheels by its automatic starting. The machine was of the ordinary construction, and was started and stopped by a belt-shipper, used to throw the driving-belt from the loose pulley to the tight pulley to start the machine, and the reverse to stop it. The machine required two persons

[1] See, also, Connors *v.* Durite Manuf. Co., 156 Mass. 163.

to operate it, one at the shipper end and one at the opposite end of the machine. The shipper was about two feet long, with nothing to hold it in place except that it was pivoted in the centre. The plaintiff's expert testified that a machine operated in that manner by two persons had some special danger, which rendered it necessary to have the shifting-bar latched or locked, in order to prevent the belt from running from the loose on to the tight pulley and starting the machine. There was no latch or lock on the shifting-bar, and the plaintiff contended that the absence of such a safety appliance was a defect in the condition of the defendant's machinery which entitled her to go to the jury either on her common-law or statutory count; but the court held the contrary.

In delivering the opinion, Mr. Justice Lathrop says, on page 262 : " The machine was in the same condition at the time of the accident as it was when the plaintiff entered the defendant's employ. There is no evidence that there was any defect in it, or that it differed from similar machines in use elsewhere. The mere fact that certain contrivances, if on the machine, might have prevented its starting, is not enough to charge the defendant; and we see no evidence to warrant the jury in finding that there was any breach of duty on the part of the defendant."

In Dingley *v.* Star Knitting Co., 134 N. Y. 552, a boy fifteen years of age was injured by the automatic starting of a carding-machine. It had started in the same way three times previously, but no defect in the machine was pointed out in the evidence at the trial. It was held by four justices (two justices dissenting)

that the evidence would not warrant a finding of negligence on defendant's part, and that a nonsuit was properly ordered.

§ 161. *Inference against Defendant when he introduces No Evidence.*

This rule applies with greater force when the defendant does not introduce any evidence respecting the cause of the accident. In such case the jury is entitled to draw an inference against the defendant. Thus, in a leading Massachusetts case, Griffin *v.* Boston & Albany Ry., 148 Mass. 143, a night-watchman in the defendant's employ was killed by the rear part of a freight train, which had separated into two parts before it reached his station. The only evidence tending to show negligence of the defendant was that the coupling-link between the two cars which separated had spread or opened sufficiently wide to allow the coupling-pin to come out. The defendant offered no evidence whatever. It was held that, in the absence of a defensive explanation respecting the cause of the injury, the evidence established a *prima facie* case of negligence which would warrant a verdict in favor of the plaintiff.[1] In delivering the court's opinion, Mr. Justice Charles Allen says, on page 147: —

"The separation of a train in consequence of the spreading of a link, where nothing further appears, is more naturally to be attributed to an imperfection or defect in the link than to any other cause. Ordinarily, such separation would not happen if the link was sound

[1] See, also, to the same effect, Guthrie *v.* Maine Central Ry., 81 Me. 572.

and suitable for use. If the link was not sound and suitable for use, the fact of its being used in that connection properly calls for explanation from the defendant; and if, under such circumstances, the defendant fails to put in any evidence, some inference against it may be drawn therefrom. The fact may be susceptible of an explanation sufficient to exonerate the defendant. But, in the absence of such explanation, we think the jury might properly infer negligence on the part of the defendant."

§ 162. *What amounts to a "Defensive Explanation" of the Injury.*

A "defensive explanation" of the injury means an explanation founded upon a cause for which the defendant is not responsible to the plaintiff.

Joy *v.* Winnisimmet Co., 114 Mass. 63, presents an illustration of a "defensive explanation" respecting the cause of the injury. The plaintiff was a passenger on a ferry-boat owned by the defendant, and was injured while leaving the boat by being crushed between the boat and the landing-slip. The plaintiff's evidence showed that a chain used to prevent the passengers from leaving the boat before it was fastened to the slip had been removed before it was so fastened; but his evidence did not show that any of the defendant's servants had removed the chain, unless the fact that the chain had been removed when he attempted to leave the boat was evidence of that fact. It also appeared that about fifty persons had pressed forward and left the boat in advance of the plaintiff. On behalf of the defendant, the servant whose duty it was to fasten the

boat and remove the chain testified, without contradiction, that at the time of the accident he had not finished securing the boat, and had not removed the chain. It was held that the evidence would not warrant a finding of negligence on defendant's part, and that the plaintiff was not entitled to go to the jury.

If the undisputed evidence shows that the injury was caused by a latent defect, which could not have been discovered and remedied by ordinary care and inspection, this will constitute a defensive explanation and rebut the presumption of negligence, and warrant an instruction to find for the defendant.

In Ryder *v.* Kinsey, 59 Minn. 000; 64 N. W. Rep. 94, the plaintiff, while walking along a public street in the city of St. Paul, was injured by the fall of a wall of a small building owned by the defendant. The building had been bought by the defendant after its construction, and there was nothing in its external appearance to indicate a defective condition. After the wall fell, it was discovered that it had not been "anchored," or supported in the manner usual in the case of such veneered brick walls, and this was the cause of its fall. It was held that this was a latent defect in the wall which could not have been discovered by ordinary care; that such undisputed evidence furnished an explanation respecting the cause of the wall's falling, and justified a direction to return a verdict for the defendant.[1]

In Griffin *v.* Boston & Albany Ry., 148 Mass. 143, the facts of which are stated in § 161 above, it was held that if a fellow-servant had caused the separation

[1] See, also, Louisville &c. Ry. *v.* Campbell, 97 Ala. 147.

of the train by pulling the coupling-pin, or if its separation had been caused by any other matter for which the defendant was not responsible to the plaintiff, this would have constituted a defensive explanation which would have justified an instruction to find for the defendant.

The jury are, of course, not bound to believe the explanation offered by the defendant, and therefore, if it be disputed by the plaintiff, the question should be submitted to the jury with proper instructions, and should not be withdrawn from them.[1]

§ 163. *Actions under Employers' Liability Acts. Subdivisions of Subject.*

This subject will be discussed under three subdivisions, as follows: —

(*a*) Defects in the ways, works, machinery, or plant;
(*b*) Negligence of a superintendent;
(*c*) Negligence of a person in charge or control of any signal, switch, locomotive engine, or train upon a railroad.

§ 164. (*a*) *Defects in the Ways, Works, Machinery, or Plant.*

In Bowers *v.* Connecticut River Ry., 162 Mass. 312, a freight brakeman was injured while attempting to couple two foreign cars then in use by the defendant railroad. The defect complained of was too much lateral motion or play of the draw-bars, which allowed one draw-bar to slip out of place and by the other

[1] Graham *v.* Badger, 164 Mass. 42; 41 N. E. Rep. 61; Volkmar *v.* Manhattan Ry., 134 N. Y. 418.

draw-bar, which defect had not been discovered or remedied owing to the negligence of the defendant's car-inspector. One witness for the plaintiff testified that there was "all of four inches'" play in the draw-bar of one of the cars, and "not quite so much play" in the draw-bar of the other car, and that there ought not to be over an inch play in the draw-bars. Car-inspectors were furnished by the defendant at the station where the injury occurred. Under the first count, which was at common law, it was held that a verdict was properly ordered for the defendant, because there was no sufficient evidence that the defendant had failed to make proper provision for the inspection of foreign cars, and the negligence in not discovering the defect, if any, was that of a fellow-servant, the defendant's common-law duty being merely that of inspection.[1] With respect to the second count, however, which was under the Employers' Liability Act, for a defect in the condition of the ways, works, or machinery, etc., it was held that the plaintiff was entitled to go to the jury; that the cars, though not owned by the defendant, must be deemed a part of its works and machinery within the meaning of the act, and that there was sufficient evidence of a defect therein,[2] and of negligence on the part of the car-inspector in failing to discover or remedy the defect, to warrant a verdict for the plaintiff.

In Kansas City &c. Ry. *v.* Webb, 97 Ala. 157, a

[1] Mackin *v.* Boston & Albany Ry., 135 Mass. 201.

[2] The draw-bar of a locomotive engine, if placed too low, may be a defect which will render an employer liable to an employee even at common law. Lawless *v.* Connecticut River Ry., 136 Mass. 1.

locomotive jumped the track and injured the engineer. The plaintiff's evidence tended to show that two defects in the track had existed for some weeks before the accident, to the knowledge of the road-master and section foreman, and that they had failed to remedy them: first, that a split rail which had formed part of a switch had been allowed to remain after the use of the switch had been discontinued, and that this rail had been insecurely fastened, and had become loose and out of line with the succeeding rail; second, that in constructing the curve where the accident happened, which was on a scale of fourteen degrees, the outer rail was not sufficiently raised above the inner rail. In an action under the Employers' Liability Act, it was held that the plaintiff was entitled to go to the jury, and that a finding of negligence on the part of the defendant railroad was warranted by the evidence.

The mere fact, however, that a car-brake sticks does not constitute a defect in its condition within the Alabama statute, nor entitle the plaintiff to go to the jury. In Louisville &c. Ry. *v.* Binion, 98 Ala. 570, a freight brakeman, while making a third attempt to let off a sticking brake, was thrown between the moving cars and injured. He had himself set the brake a short time before the accident. There being no other evidence that the brake was defective, it was held that an action under the Employers' Liability Act could not be maintained, and that the presiding justice should have given the general affirmative charge for the defendant.

Nor does the fact that a brakeman was injured through the breaking of the brake-rod of a railroad car

constitute sufficient evidence of negligence to require the submission of the case to the jury, even when half of the break was an old and rusty break, if it was so situated under the car as to form a hidden defect which could not be discovered upon careful inspection.[1]

§ 165. *Same.*

In Allen *v.* Smith Iron Co., 160 Mass. 557, an employee was killed by the breaking of a wooden lever, which was being used to raise an iron door, which formed half the bottom of a cylindrical furnace. In an action under the Employers' Liability Act by his administratrix, it appeared that the lever had been in use for a long time, but was not specially worn at the point of strain, and the plaintiff claimed that she was entitled to go to the jury on the ground that the defendant failed to furnish a proper lever. It was held that a verdict should have been directed for the defendant. In delivering the opinion of the court, Mr. Justice Holmes says, on page 558: "In the first place, there is no evidence that the stick [lever] was defective except that it broke, and none that it appeared to be defective, or could have been discovered to be so. It had been in use for a long time, but was not specially worn at the point of strain. It would not have been permissible for the jury to find that the stick ought to have been known to be defective because of its age alone."

In Tuck *v.* Louisville &c. Ry., 98 Ala. 150, an action under the Alabama statute, a freight brakeman was killed while in the discharge of his duties. The plain-

[1] Louisville &c. Ry. *v.* Campbell, 97 Ala. 147.

tiff's evidence showed that after the freight train had proceeded eighty miles it separated into two parts by reason of a tail-bolt, which held the cars together, drawing out. It was held that the fact that the train separated under these circumstances was not sufficient evidence of a defect in the condition of the machinery of the defendant to entitle the plaintiff to go to the jury, and that a verdict was properly ordered for the defendant.

In Richmond &c. Ry. *v.* Weems, 97 Ala. 270, the plaintiff, while engaged in working a derrick, was injured by the breaking of the gudgeon-pin which fastened the arms of the derrick to the mast. The pin was a comparatively new one, and was made of steel. The plaintiff's evidence tended to show that the pin was too small and should have been made of iron, and contended that it constituted a defect in the defendant's machinery, and that it was unsafe and unfit for the purpose for which it was intended and used. The defendant's evidence was of a contrary tendency. It was held that the question of defendant's negligence in furnishing such a pin was one for the jury, and that the affirmative charge to find for the defendant was properly refused.

In Bivins *v.* Georgia Pacific Ry., 96 Ala. 325, a freight brakeman, while attempting to board his train in motion after setting a switch, caught his clothes on the switch-handle, and was pulled off the car and fell under the wheels. The only defect complained of was that the sill on which the machinery rested for throwing the switch extended beyond the track embankment, and that there was no filling under the extension so

as to bring the embankment up to a level with it. The switch had been in the same condition for five years prior to the injury, during which period no accident had occurred, and the plaintiff was familiar with the switch, having been a brakeman on that section of the road for four months. There was no proof, other than the accident itself, that machinery thus constructed was dangerous. It was held that an instruction to find for the defendant was properly given.

In Smith *v.* Baker, [1891] A. C. 325, 335, an action under the English act of 1880, Lord Halsbury, L. C., says, though he immediately adds that the question of the defendant's negligence was not open on that appeal: "I think the unexplained and unaccounted-for fact that the stone was being lifted over a workman, and that it fell and did him damage, would be evidence for a jury to consider of negligence in the person responsible for the operation."

§ 166. (*b*) *Negligence of a Superintendent.*[1]

In Mahoney *v.* New York &c. Ry., 160 Mass. 573, a freight-handler was injured while assisting in unloading a bale of burlaps, weighing about 2,200 pounds, from an express wagon. One Grady was the section boss who superintended the unloading, and whose negligence the plaintiff alleged caused his injury. The express wagon had been backed up to the door of the defendant's freight-house, and, while the plaintiff and others were trying to push the bale of burlaps from the wagon into the freight-house, the rear of the wagon settled down, the bale fell out, the wagon was forced into the

[1] For other cases upon this subject, see ch. iv. §§ 52–60.

street, and the plaintiff was thrown out under the bale and injured. Grady had ordered the teamster to trig or scotch the wheels of the wagon, but he had not used a gang-plank which was near by, and which would have prevented the accident if it had been used. It was held that the evidence justified a finding that the superintendent, Grady, was negligent. In the course of the opinion, Mr. Justice Knowlton says, on page 579: "The mere happening of an accident, if it is one that the exercise of ordinary care would commonly prevent, is some evidence of negligence.[1] Grady, the superintendent, had the responsibility of determining how the bales should be loaded [unloaded]. It was proved that there was a gang-plank near by which might have been used, and which if used would have prevented this accident. The jury may have found from the evidence that, if the wheels of the wagon had been more securely trigged or scotched, it would not have moved forward from the pressure and the accident would not have happened. It was the duty of Grady, who ordered the men to unload the bale, to take all reasonable precautions to insure their safety. In this respect his relation to the work differed materially from that of the plaintiff and the other men. The plaintiff had a right to assume that the wheels were properly trigged, and that the method selected by the foreman for unloading was safe and proper."

In Hennessy *v.* Boston, 161 Mass. 502, a laborer while digging a trench was injured by the side caving in, through the negligence, as he alleged, of the defendant's superintendent. There were no braces in the

[1] Citing White *v.* Boston & Albany Ry., 144 Mass. 404.

trench, which was deep, long, and narrow, except two blocks of earth about four feet wide, which were left untouched, and these blocks were about twenty-five feet apart. There was no unexpected or extraneous cause for the caving in of the earth. It was held that the plaintiff was entitled to go to the jury on the question of the superintendent's negligence. In the language of the court, stated by Mr. Justice Knowlton on page 503: "It was an accident of a kind that is commonly preventable by the exercise of ordinary care; and the accident itself, in connection with the circumstances shown in regard to the depth of the trench and the slope of its sides, and the distance of the braces from each other, furnishes evidence from which the jury might have found negligence on the part of the foreman in charge of the work." [1]

§ 167. *Same.*

In Carroll *v.* Willcutt, 163 Mass. 221, the plaintiff, while engaged in cleaning brick, was struck on the head and leg by a large ledge-stone, which fell from a staging about twenty feet above him. A considerable part of this stone projected over the outside edge of the staging, and had been in that position for two or three days, and the plaintiff claimed that the defendant's superintendent was negligent in not discovering that the stone was so placed as to be liable to fall if it should be hit, or if the staging should be jarred in the prosecution of the work. How much of the stone projected over the staging could only be seen from above, and there was no evidence that the stone had been so

[1] See, also, Connolly *v.* Waltham, 156 Mass. 368.

placed by the specific order of the superintendent, or that he had visited that part of the work while the stone was there, or had actual knowledge that the stone was upon the staging. The floors had not been put in, and the roof was not on. In an action under the Massachusetts act, it was held that the evidence would not warrant a finding that the superintendent was negligent, and that a verdict was properly ordered for the defendant.

McCauley *v.* Norcross, 155 Mass. 584, was very like Carroll *v.* Willcutt, *supra*, in its leading facts; but is distinguishable, chiefly, for the reason that the superintendent ordered the beams, one of which fell and injured the plaintiff, to be put on the floor where they were, and allowed them to remain in a dangerous position for two or three days. It was held that the jury was warranted in finding negligence on the part of the superintendent.

Evidence that the foreman in charge of a railroad roundhouse sent the plaintiff there to make certain repairs upon a locomotive engine, without warning him of the danger arising from "blowing down" the engine, and without notifying the engineer that the plaintiff had been sent, will not warrant a finding that the foreman was negligent, and a verdict should be ordered for the defendant.[1]

[1] Perry *v.* Old Colony Ry., 164 Mass. 296; 41 N. E. Rep. 289.

§ 168. (c) *Negligence of a Person in Charge or Control of any Signal, Switch, Locomotive Engine, or Train upon a Railroad.*

In Graham *v.* Boston & Albany Ry., 156 Mass. 4, a freight brakeman was injured, as he alleged, by the negligence of the engineer in charge or control of the train, by starting the train with an unusual jerk, which caused an oil-tank to slip and crush the plaintiff's hand. The plaintiff testified that he did not know whether the train started suddenly or not. A witness for the plaintiff testified that starting with a jerk is something that will happen on any freight train, and that he could not swear whether it was a usual or an unusual jerk. The engineer testified that he did not start with an unusual jerk, and that he did nothing out of the ordinary. There was no evidence that the oil-tank would not slip a little when the train was started in the ordinary way. It was held that this evidence would not warrant a finding that the engineer was negligent, and that a verdict should have been ordered for the defendant.

In Birmingham Ry. *v.* Wilmer, 97 Ala. 165, a brakeman, while in the careful discharge of his duty on top of a freight-car, was thrown off and injured by the sudden starting of the train on an up grade. The plaintiff contended that the engineer in charge of the locomotive was negligent, and he testified that the train was started with an "unusual hard jerk," and it was not disputed that the plaintiff was either knocked off or fell off in consequence of this jerk. In an action under the Alabama act it was held that the statement that the

train started with an "unusual hard jerk" was admissible as a "short-hand rendering" of facts, and that the evidence would warrant a finding of negligence on the part of the engineer, for which the defendant was liable. In the court's opinion, delivered by Mr. Justice McClellan, it is said on page 169: "Moreover, it is not disputed that plaintiff was knocked off by, or fell off the train in consequence of, this jerk. This was itself some evidence for the jury that the jerk was unusually and negligently severe. It surely cannot be said to be usual or necessary to jerk a train into motion under any circumstances with such force and suddenness as to hurl employees from the top of it while they, as the jury might have found the plaintiff to be, are ordinarily careful and diligent. The testimony of the plaintiff as to the character of the jerk, the fact that he was thrown off or fell off at the time of the jerk, and his further testimony as to what he was doing at the time and the manner of doing it, which the jury might have believed, and, believing, found that he was using due care to maintain his position, but that, notwithstanding this, the jerk was so violent as to inflict the injury complained of, was such evidence of the engineer's negligence as to require the case to go to the jury."

In Thyng *v.* Fitchburg Ry., 156 Mass. 13, a brakeman was killed by the breaking apart of a freight train. The two cars between which the coupling gave way were not the property of the defendant. In this action under the Massachusetts act, the administratrix of the brakeman sought to charge the defendant on the ground that the injury was caused by the negligence

of a person having the charge or control of a train. The only evidence which tended to support this view was that too short a coupling-pin had been used in making up the train. The defendant's evidence showed that in the freight-yard where the train was made up there were always pins of all different lengths, and this was undisputed by the plaintiff. It was held that the evidence did not indicate negligence of a person in charge or control of a train as distinguished from negligence of a fellow-servant, and that a verdict was properly ordered for the defendant.

§ 169. *Same.*

In Mears *v.* Boston & Maine Ry., 163 Mass. 150, the conductor of a freight train allowed one of the cars to be "kicked" off on to a track with a descending grade without a brakeman upon it, contrary to the rules of the road. It ran into two freight-cars and killed the plaintiff's husband, while he was inspecting a freight-car in the due performance of his duties. In an action under the act, it was held that the evidence would warrant a finding of negligence on the part of the conductor, for which the defendant was liable, and that the presiding justice erred in ordering a verdict for the defendant.

In Tennessee Coal Co. *v.* Hayes, 97 Ala. 201, the plaintiff, while engaged in loading coal into an empty car, was injured by another car colliding with his car on a down grade. The person in charge of the second car put it in motion by "pinching," and the first car was at rest. There was some evidence that the second car was supplied with a brake, and that after the car was

started no effort was made to stop it by using the brake. It was held that this evidence would justify a finding of negligence for which the defendant was liable under the act. Another part of the evidence tended to show that there was no brake on the car, and that the person in charge of it, one Ried, and his son, undertook to stop the car by putting obstructions on the track in front of it. It was held that the fact that the car was allowed to escape and run wild, when it might have been controlled and moved in safety, would justify an inference of negligence, on the maxim *res ipsa loquitur*, and a verdict against the employer under the statute. In the language of the court by Mr. Justice McClellan, on page 207: "There was, in other words, evidence from which the jury might have found that a car having no brake could with due care have been safely moved and controlled by the Rieds; and from the fact that this one was not so moved and controlled, but allowed to escape and run wild, it not appearing that everything which due care and diligence required was done to control it, the jury were at liberty to infer, on the maxim *res ipsa loquitur*, that the requisite care was not used by them."

In Birmingham Ry. *v.* Baylor, 101 Ala. 488; 13 So. Rep. 793, a locomotive fireman was injured by the train running on to a spur track from the main track, through the alleged negligence of the person in charge of the switch in leaving it open. The evidence was, that the switch had been used about thirty minutes before the accident, and the engineer testified that it was properly secured before he left it. The plaintiff's train was the next one to pass the switch, and he

testified that his train left the main track and went through the switch on to the spur track. It was held in this action under the Alabama statute that there was sufficient evidence that the switch was open to require the submission of the case to the jury.

Other cases under this head are cited in the footnote.[1]

[1] Mary Lee Coal Co. *v.* Chambliss, 97 Ala. 171 ; Gibbs *v.* Great Western Ry., 12 Q. B. D. 208.

CHAPTER XIII.

DIRECTING A NONSUIT OR VERDICT FOR DEFENDANT (CONTINUED).

II. *Plaintiff's Contributory Negligence.*

Section
170. Tests and illustrations in Massachusetts.
171. Alabama rules.
172. Employee's death while in discharge of duty. Massachusetts cases.
173. Same. Alabama cases.

§ 170. *Tests and Illustrations in Massachusetts.*[1]

In an action under the Massachusetts statute, Mr. Justice Knowlton, in delivering the opinion of the court, says: "It does not appear that the plaintiff was doing anything which would generally be deemed careless by prudent men, and we cannot say, as matter of law, that he was not in the exercise of due care."[2] It was held that the case was properly submitted to the jury, and that a verdict for the plaintiff was warranted by the evidence.

In Graham *v.* Boston & Albany Ry., 156 Mass. 4, a freight brakeman had his hand injured by the shifting of an oil-tank in a car which he was uncoupling from another car in a train. In an action under the statute

[1] Many other cases upon this subject are cited and stated in the chapter on Contributory Negligence, §§ **113–122**, *ante*.

[2] Mahoney *v.* New York &c. Ry., 160 Mass. 573, 579. See, also, Gibson *v.* Sullivan, 164 Mass. 557.

the plaintiff testified that he had never before seen a car with a space between the oil-tank and the block designed to keep the tank in place; that when he reached over with his right hand to get the coupling-pin he also reached back with his left hand for the grab-iron; that, not finding it, he took hold of the block, and the engineer started up the train with a jerk, and the oil tank shifted and crushed his hand against the block. It was held that there was sufficient evidence of due care to go to the jury. In delivering the court's opinion, Mr. Justice Knowlton says, on page 8: —

"We are of opinion that the question whether the plaintiff was in the exercise of due care was rightly submitted to the jury. If he had reflected carefully, he might have known that the tank would be likely to slip a little on the car when the train started up with a jerk; but he testified that he had never before seen a car with a space between the tank and the block which was designed to keep the tank in place, and it is not very strange, when he reached back with his hand 'to feel if there was a grab-iron there,' that he took hold of the block and exposed his fingers to danger without thinking of the consequences."

In Thompson *v.* Boston & Maine Ry., 153 Mass. 391, a brakeman was injured in the act of jumping off a freight train in slow motion, in order to set a brake on another part of the train under the conductor's orders. He swung off between two cars, without looking ahead or taking any other precaution to avoid obstructions near the track, and did not see a pile of rails near the track until it was too late for him to regain his position of safety. He was obliged to let go, and fell upon

the pile of rails and was injured. It was held that he was guilty of contributory negligence, and could not recover either under the Employers' Liability Act or at common law, and that it was proper to direct a verdict for the defendant.

A workman standing aloft on a pile-driver, engaged in placing a pile in position for driving, is not guilty of contributory negligence if he puts his hand on top of the pile, directly in the line of descent of the hammer; and if his hand is injured by the hammer's falling prematurely, through the negligence of the defendant's superintendent in giving an order, he may recover under the statute.[1]

The rules of the common law upon this subject in Massachusetts are substantially like those stated above under the Employers' Liability Act.[2]

§ 171. *Alabama Rules.*

In McNamara *v.* Logan, 100 Ala. 187, the plaintiff was crushed between the wall of a mine entry and a car, while he was attempting to sprag the car-wheels on a down grade. It was the first trip that plaintiff had made in the entry, and at the place where he was injured the wall was so close to passing cars as to render spragging dangerous, but plaintiff did not know this fact. One D, who had charge of the drivers, went with the plaintiff to show him where to begin

[1] McPhee *v.* Scully, 163 Mass. 216.

[2] Bjbjian *v.* Woonsocket Rubber Co., 164 Mass. 214 (rubber compounding machine); Degnan *v.* Jordan, 164 Mass. 84 (elevator); Murphy *v.* Webster, 151 Mass. 121; s. c., 156 Mass. 48 (elevator); Taylor *v.* Carew Manuf. Co., 140 Mass. 150; s. c., 143 Mass. 470 (elevator well); Lawless *v.* Connecticut River Ry., 136 Mass. 1 (locomotive).

spragging, which was done on the down grade by running along beside the car. When they reached the grade, D jumped off to sprag the wheels on his side, and the plaintiff jumped off on his side and, while running along beside the car attempting to sprag the wheels, he was crushed between the car and the wall. It was held that the defendant's request for a ruling that the plaintiff could not recover, because he had been guilty of contributory negligence, was properly refused by the presiding justice; that the question was at least one for the jury to determine; and that a finding for the plaintiff was justified by the evidence.

In Richmond &c. Ry. *v.* Thomason, 99 Ala. 471, a brakeman, while attempting to uncouple two cars while in motion without using a stick, in violation of a known rule of the railroad company, was thrown between the cars and crushed, through the negligence of the locomotive engineer in suddenly stopping and starting the train. It was held that he was guilty of contributory negligence, and that the jury should have been directed to find for the defendant in an action under the Employers' Liability Act.[1]

In Davis *v.* Western Ry., 104 Ala. 000; 18 So. Rep. 173, a switchman had his arm crushed in attempting to uncouple cars in a moving freight train. A foreman to whose order the plaintiff was bound to conform ordered him to "cut off one car." There was no emergency requiring haste. The cars had double deadwoods, and were going backwards, and were pulling on the engine so that the draw was taut. He failed to give the usual signal to the engineer to cause a slack between the cars

[1] See, also, Richmond &c. Ry. *v.* Free, 97 Ala. 231.

before going between them, and when the slack came he was crushed between the deadwood. He was a man thirty years of age, and had worked on railroads and in switching cars for about nine years, and had worked in defendant's yard for about one year. In an action under the Employers' Liability Act it was held that a verdict was properly ordered for the defendant, upon the ground that the plaintiff had been guilty of contributory negligence.

In Burgin *v.* Louisville &c. Ry., 97 Ala. 274, a brakeman jumped off the pilot of a moving engine at an unusual place for employees to alight, at which place there was a low embankment. It was dark at the time, and, although he carried his lighted lantern in one hand, he did not use it to see where he would alight. There was no necessity for his getting off at that place, and the danger was an obvious one if he had stopped to look. It was held that no ordinarily prudent man would have done such an act under the circumstances, that he was guilty of contributory negligence, and that a verdict was properly ordered for the defendant.[1]

In Louisville &c. Ry. *v.* Markee, 103 Ala. 000; 15 So. Rep. 511, a section foreman in charge of a hand-car was killed by a collision with a train of cars on a curve. The rules of the railroad company required curves to be flagged by section foremen, and a constant lookout kept. The deceased, although he knew this rule, failed to flag this curve, and there was evidence that if the curve had been flagged the engineer would have had time and space sufficient to have stopped the train, and

[1] See, also, Thompson *v.* Boston & Maine Ry., 153 Mass. 391; Richmond &c. Ry. *v.* Bivins, 103 Ala. 000; 15 So. Rep. 515.

thus to have prevented the collision, both the train and the hand-car moving in the same direction. It was held in an action by his administratrix under the statute that he was guilty of contributory negligence.

As to what acts on the part of a locomotive engineer in charge of an engine will constitute contributory negligence as matter of law on his part, so as to prevent a recovery by him or his personal representative under the Alabama statute, see Louisville &c. Ry. *v.* Stutts, 104 Ala. 000; 17 So. Rep. 29.

§ 172. *Employee's Death while in Discharge of Duty. Massachusetts Cases.*

In Massachusetts the fact than an employee is killed while in the discharge of his work, without proof as to what he was doing at the time, will not warrant a finding that he was in the exercise of due care, and a verdict should be ordered for the defendant, whether the action is at common law[1] or under the Employers' Liability Act.[2]

In Geyette *v.* Fitchburg Ry., 162 Mass. 549, a freight brakeman on a night train was killed by falling off the train at about four o'clock in the morning of a dark night. The train consisted of two engines, twenty-two cars, and a caboose. The deceased, while on the second engine, stated that he could not see the red light on the rear of the train, and he started out to ascertain if the train had broken apart. As a matter of fact, the train

[1] Corcoran *v.* Boston & Albany Ry., 133 Mass. 507; Riley *v.* Connecticut River Ry., 135 Mass. 292.

[2] Tyndale *v.* Old Colony Ry., 156 Mass. 503; Irwin *v.* Alley, 158 Mass. 249; Felt *v.* Boston & Maine Ry., 161 Mass. 311.

had previously broken apart. He was not seen alive after he left the engine, and his dead body was found in the centre of the track between the rails. There were indications that he struck on his feet between the tracks and was run over by the rear part of the train. In an action under the Employers' Liability Act, it was held that the evidence failed to show that the deceased was in the exercise of due care, and that a verdict for the defendant was properly ordered by the presiding justice.

But where the evidence shows that the deceased was in the performance of his duty shortly before the accident, and that the circumstances did not call for any positive act of care on his part in reference to the force which caused the accident, a finding of due care will be justified, and the case should not be withdrawn from the jury.[1]

Likewise, when the deceased was performing his duty at the time of the injury, and was injured by a defect or breach of duty which had arisen or occurred suddenly without his knowledge, the question of his due care is generally one for the jury. Thus, in Gustafsen *v.* Washburn & Moen Manuf. Co., 153 Mass. 468, an employee was killed by falling into a ditch across a railroad track on the defendant's premises while he was assisting in pulling a loaded car along the track. The ditch had been dug on the morning of the accident, and no warning had been given to the deceased, or to the other employees who had formerly used the track.

[1] Thyng *v.* Fitchburg Ry., 156 Mass. 13, as explained in Geyette *v.* Fitchburg, 162 Mass. 549, 551; Caron *v.* Boston & Albany Ry., 164 Mass. 523; Houlihan *v.* Connecticut River Ry., 164 Mass. 555.

The operation of pulling the car required the men to lean forward and bend down their heads. There was no direct evidence that the deceased knew of the existence of the ditch. In an action under the Massachusetts act, it was held that it was a question for the jury to determine whether the deceased was in the exercise of due care at the time of his injury.

In Mears *v.* Boston & Maine Ry., 163 Mass. 150, a car-inspector was instantly killed by being crushed by a freight-car while he was inspecting another car in the course of his duty in the defendant's employ. A car had been "kicked" off from a freight train, and sent down a descending grade on a track without a brakeman, contrary to a rule of the railroad. It struck two box-cars which had been left standing on the track in such a position as to cut off from the view of the deceased the approaching car, and he had no notice that a car would be kicked off and sent down the track in that manner. It was held, in this action under the statute by his widow, that there was sufficient evidence of due care on his part to require the submission of the case to the jury, and that the trial judge erred in directing a verdict for the defendant.

In McLean *v.* Chemical Paper Co., 165 Mass. 5, the failure of the deceased to notify the fireman in charge of a steam boiler that he was going into a manhole connected with the boiler was held to be contributory negligence, and to justify a direction to find for the defendant.

§ 173. *Same. Alabama Cases.*

In Alabama the burden of proving contributory negligence rests upon the defendant, and when there is no proof of such negligence the plaintiff is entitled to go to the jury upon this question, and a verdict should not be ordered for the defendant because the plaintiff has not shown that he was in the exercise of due care and diligence at the time of the injury. In this respect the Alabama rule differs radically from that of Massachusetts, and the difference is very apparent in the class of cases now under consideration.

In Bromley *v.* Birmingham Ry., 95 Ala. 397, a freight brakeman fell off his train while in motion, and was run over and killed. No one saw him fall, and there was no evidence as to the circumstances immediately preceding his death. Shortly before his death, the train separated into two parts, and it then became his duty to at once apply the brakes. He was last seen alive standing on the top of a rear car near the brake, and a few moments afterwards his body was found between the rails, crushed by the car. The car had a large hole in the top, near the brake. The conductor knew of this hole, and it was obvious to any one in the daylight. In an action under the Alabama statute by his administrator, it was held that the plaintiff was entitled to go to the jury, both upon the question of due care and upon the question that there was a defect in the car which caused his death. In delivering the court's opinion, Mr. Justice Coleman says, on page 399: "If the facts and circumstances proven are such that a jury would be authorized to legally infer that deceased

was engaged in the performance of his duties as brakeman; that the hole in the top of the box-car was the proximate cause of the injury, and if there was no evidence of contributory negligence, — then the court was not authorized to give the general charge for the defendant, but under such proof the question should have been submitted to the jury. If, however, the facts proven leave the question as to what caused the injury wholly in conjecture, as distinguished from legal inference, there was nothing to submit to a jury. The burden is upon the plaintiff to make out his case. He must not only aver and prove both an injury and negligence, but he must go further and establish a proximate causal connection between the injury and the negligence."

On page 405 the same learned justice says, after reviewing the cases from several other States: "There must be some proof or circumstance to show that the negligence caused the injury, and the presumption that no one will contribute to his own injury cannot take the place of such evidence. It is not necessary that there be an eye-witness, if there are other circumstances which tend to show that the defect in the top of the car caused the fall; and if these were shown, the general charge should not have been given. Considering the character of the hole, its location with regard to the location of the brakes, the duty to be performed in setting up brakes, the fact that the brakeman was last seen alive at this point where his duty called him, that he fell and was run over by the cars, — taking into consideration these attending circumstances, we cannot say that there was no evidence from which an

inference might not be legally drawn by a jury that the defect caused the injury. We think, under all the facts proven, that the question should have been referred to the jury."

In Nave *v.* Alabama Great Southern Ry., 96 Ala. 264, the plaintiff's intestate, a boy fifteen years of age, was killed by a south-bound train. He had been stationed at the place of injury to signal north-bound trains to stop, in order to protect a gang of men who were laying steel rails on the track about a mile to the north of him. He was killed about ten o'clock in the morning. The track was straight for half a mile, and he had an unobstructed view of it and of the approaching train. No warning of the train's approach was given. The defendant's evidence tended to show that the deceased was asleep, lying with his body extending down into a ditch, and in such a position that he could not be seen until the train was within a few feet of him. In an action under the Alabama act, it was held that the deceased was guilty of contributory negligence, and that a verdict was properly ordered for the defendant. The court stated that it had not considered the defendant's evidence in reaching its conclusion.

CHAPTER XIV.

DIRECTING A NONSUIT OR VERDICT FOR DEFENDANT (CONCLUDED).

III. *Assumption of Risk, and Volenti non fit Injuria.*

A. DEFECTS IN THE WAYS, WORKS, MACHINERY, OR PLANT.

Section
174. Preliminary observations and subdivisions of chapter.
175. Definitions and illustrations.
176. Continuance in defendant's employ with knowledge of the risk. (1) English rule.
177. Same. Same.
178. Same. Same. Statutory defects.
179. Same. (2) Alabama rule. Early cases.
180. Same. Same. Late cases.
181. Same. (3) Massachusetts rule. Absence of guard-rail, or other safety appliance.

Section
182. Obvious danger.
183. Same. Ignorance of plaintiff, and failure to warn him of increased danger.
184. Same. Work outside of ordinary duty. Finding of due care of plaintiff.
185. Understanding and appreciation of danger.
186. Same. Young and inexperienced employees.
187. Assumption of risk by minor employee.

B. NEGLIGENCE OF A SUPERINTENDENT.

188. No assumption of risk from superintendent's negligence under the statute.
189. Common-law rule.

C.

190. Negligence of one having charge or control of signal, switch, locomotive engine, or train upon a railroad.

A. DEFECTS IN THE WAYS, WORKS, MACHINERY, OR PLANT.

§ 174. *Preliminary Observations and Subdivisions of Chapter.*

In so far as the defence of assumption of risk relates to defects in the condition of ways, works, machinery, or plant, the Employers' Liability Acts have not changed the common-law rules upon the subject; the common-law liability of the employer is neither enlarged nor lessened by the statutes upon the question of assuming the risk of such defects, but remains precisely the same. In a case of this nature brought under the Massachusetts act, with a count at common law, the court, by Mr. Justice Lathrop, expressly says: "On the question whether the plaintiff took the risk, there is no difference whether the action is brought at common law or under the statute of 1887, ch. 270." [1] A like principle applies to the maxim *volenti non fit injuria.*

After reviewing some of the English and Massachusetts decisions, the Alabama court says, in Birmingham Ry. *v.* Allen, 99 Ala. 359, 374, per Mr. Justice Coleman: "It is very clear that, so far as the authorities outside of this State go, the rule declared in the case of Eureka Co. *v.* Bass, 81 Ala. 200, was not abolished by the Employers' Liability Act. Possibly it was somewhat modified, but, as we understand the rule *volenti non fit injuria* as applied in the particular cases cited

[1] Cassady *v.* Boston & Albany Ry., 164 Mass. 168, 170. See, also, O'Maley *v.* South Boston Gas Light Co., 158 Mass. 135; Gleason *v.* New York &c. Ry., 159 Mass. 68; Birmingham Ry. *v.* Allen, 99 Ala. 359; Smith *v.* Baker, [1891] A. C. 325.

from the English and Massachusetts courts, there has been in fact no material modification."

With respect, however, to injuries caused by the negligence of a superintendent, or, when the action is against a railroad company, by the negligence of a person having the "charge or control" of certain appliances, the Employers' Liability Acts have either entirely abolished, or at least materially modified, the doctrines of assumption of risk and *volenti non fit injuria*, and have thereby greatly enlarged the rights of employees and the liabilities of employers.[1]

The subject will be discussed under the following subdivisions: —

A. Defects in the ways, works, machinery, or plant.

B. Negligence of a superintendent.

C. Negligence of one having the charge or control of a signal, switch, engine, or train upon a railroad.

§ 175. *Definitions and Illustrations.*

Volenti non fit injuria: "That to which a person assents is not esteemed in law an injury."[2]

In Smith *v.* Baker, [1891] A. C. 325 at 355, Lord Watson says: "The maxim *volenti non fit injuria*, originally borrowed from the civil law, has lost much of its literal significance. A free citizen of Rome who, in concert with another, permitted himself to be sold as a slave in order that he might share in the price, suffered a serious injury, but he was in the strictest sense of the term *volens*. The same can hardly be said of a slater who is injured by a fall from the roof of a house,

[1] *Post*, §§ **188–190.**

[2] Broom's Legal Maxims, star page 268.

although he too may be *volens* in the sense of English law. In its application to questions between the employer and the employed, the maxim as now used generally imports that the workman had, either expressly or by implication, agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform, and from which he has suffered injury."

In O'Maley *v.* South Boston Gas Light Co., 158 Mass. 135, 136, Mr. Justice Knowlton says: —

"The doctrine of assumption of the risk of his employment by an employee has usually been considered from the point of view of a contract, express or implied; but as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed by the maxim *volenti non fit injuria.* One who, knowing and appreciating a danger, voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to take such chances as exist in the situation, without a right to claim anything from the other. In such a case there is no actionable negligence on the part of him who is primarily responsible for the danger. If there is a failure to do his duty according to a high standard of ethics, there is, as between the parties, no neglect of legal duty."

"The doctrine of *volenti non fit injuria* stands outside the defence of contributory negligence and is in no way limited by it. In individual instances the two

ideas seem to cover the same ground; but carelessness is not the same thing as intelligent choice, and the Latin maxim often applies when there has been no carelessness at all." [1] If the undisputed facts show that the plaintiff has assumed the risk, a verdict should be directed for the defendant, even if they also show that he has exercised due care and diligence.[2]

In Goodes *v.* Boston & Albany Ry., 162 Mass. 287, 288, the court, speaking through Mr. Justice Morton, says: "One entering the employment of another assumes the obvious risks arising from the nature of the employment, from the manner in which the business is carried on, and from the condition of the ways, works, and machinery, if he is of sufficient capacity to understand and appreciate them. It is not necessary to inquire whether this doctrine rests upon contract, or upon the inherent reasonableness and justice of the rule itself, as applied to the relations of master and servant. It has been long and well settled at common law, and it is not contended by the plaintiff that it does not apply to cases arising under the Employers' Liability Act, so called."

Nearly all the authorities agree that mere knowledge of the risk on the part of the employee is not sufficient to prevent a recovery under the statute.[3] The maxim is not *scienti non fit injuria*, but *volenti non fit injuria*. The test is not merely whether the injured

[1] Thomas *v.* Quartermaine, 18 Q. B. D. 685, 697, 698, per Bowen, L. J. See, also, McPhee *v.* Scully, 163 Mass. 216, 217.

[2] Mellor *v.* Merchants' Manuf. Co., 150 Mass. 362; Stuart *v.* West End Ry., 163 Mass. 391.

[3] Smith *v.* Baker, [1891] A. C. 325, 337; Thomas *v.* Quartermaine, 18 Q. B. D. 685, 696; Yarmouth *v.* France, 19 Q. B. D. 647; Mellor *v.*

employee knew of the risk, but whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by him. If not, the question should be submitted to the jury.[1]

The common-law rule is of like nature.[2]

§ 176. *Continuance in Defendant's Employ with Knowledge of the Risk.* (1) *English Rule.*

Great difference of opinion has developed upon the question whether or not the plaintiff's continuance in the employ of the defendant, with knowledge of the defect or negligence which ultimately causes his injury, will, as matter of law, prevent a recovery under the Employers' Liability Act. Does he thereby assume the risk of injury; or does he consent to or voluntarily incur the risk so as to preclude a recovery as matter of law under the maxim *volenti non fit injuria?* Or, on the other hand, is such continuance with knowledge of the risk merely one of the facts bearing upon the right of action which should be submitted to the jury under proper instructions? May the jury find on all the evidence that the plaintiff continued at work, not because he consented to incur the risk, but because the necessity of his pecuniary condition constrained him to remain?

Merchants' Manuf. Co., 150 Mass. 362, 364. *Contra*, Birmingham Ry. *v.* Allen, 99 Ala. 359 (overruling Mobile &c. Ry. *v.* Holborn, 84 Ala. 133).

[1] Cases cited above.

[2] Fitzgerald *v.* Connecticut River Paper Co., 155 Mass. 155; Mahoney *v.* Dore, 155 Mass. 513; Ford *v.* Fitchburg Ry., 110 Mass. 240; Hough *v.* Railway Co., 100 U. S. 213; Hawley *v.* Northern Central Ry., 82 N. Y. 370; Indianapolis &c. Ry. *v.* Ott, 11 Ind. App. 564; 38 N. E. Rep. 842; Dorsey *v.* Phillips Co., 42 Wis. 583; Flynn *v.* Kansas City &c. Ry., 78 Mo. 195. *Contra*, Eureka Co. *v.* Bass, 81 Ala. 200.

In Smith *v.* Baker, [1891] A. C. 325, the leading case under the English act of 1880, these questions were fully considered by the House of Lords. In that case the defendants were railway contractors, and had taken a contract to open a railway cut. The plaintiff was employed by them to drill holes in the rock. While he was engaged in the operation of drilling, a stone fell out of a crane above him and caused the injuries complained of. The crane had been worked in the same way over his head for several months before his injury, and he understood the risk of continuing to work. There was no one to warn him when the crane was coming towards him, and it was operated by other employees of the defendant. The county court refused to nonsuit the plaintiff, on the ground requested by the defendant that the plaintiff had assumed the risk and could not recover under the doctrine of *volenti non fit injuria.* The case was submitted to the jury, and a verdict for the plaintiff was returned. It was held that the question was one of fact and not of law; that by continuing in the service with knowledge and understanding of the risk, the plaintiff had not thereby assumed the risk in the sense of preventing a recovery as matter of law; that the maxim *volenti non fit injuria* did not apply; and that the verdict was warranted by the evidence.

Considerable stress was laid upon the fact that there was no inherent danger in the plaintiff's work of drilling, and that his injury had been caused by a defect in the machinery used in another department over which he had no control.

On page 357, referring to cases in which the work is

not intrinsically dangerous, but is rendered dangerous by some defect which it was the duty of the employer to remedy, Lord Watson says: —

"The risk may arise from a defect in a machine, which the servant has engaged to work, of such a nature that his personal danger and consequent injury must be produced by his own act. If he clearly foresaw the likelihood of such a result, and notwithstanding continued to work, I think that, according to the authorities, he ought to be regarded as *volens*. The case may be very different when there is no inherent peril in the work performed by the servant, and the risk to which he is exposed arises from a defect in the machinery used in another department over which he has no control. The present case belongs to that category. There was no intrinsic danger in the operation of drilling in which the plaintiff was engaged; the peril from which he suffered was not evoked by his act, but was brought into contact with him by workmen employed in a different operation."

The clause contained in the various acts to the effect that no recovery can be had if the employee knew of the defect or negligence which caused his injury and failed to give information thereof within a reasonable time, was deemed by Lord Watson to show that the legislature did not intend that an employee, by merely continuing in the service with knowledge of the defect or negligence, should thereby lose the right to recover damages which he would otherwise have possessed.[1]

Lord Halsbury, L. C., in his opinion in this case says, on page 336: "For my own part, I think that a per-

[1] Smith *v.* Baker, [1891] A. C. 325, 355, 356.

son who relies on the maxim must show a consent to the particular thing done. Of course I do not mean to deny that a consent to the particular thing may be inferred from the course of conduct, as well as proved by express conduct; but if I were to apply my proposition to the particular facts of this case, I do not believe that the plaintiff ever did or would have consented to the particular act done under the particular circumstances. He would have said: 'I cannot look out for myself at present. You are employing me in a form of employment in which I have not the ordinary means of looking out for myself; I must attend to my drill. If you will not give me warning when the stone is going to be slung, at all events let me look out for myself, and do not place me under a crane which is lifting heavy stones over my head when you keep my attention fixed upon an operation which prevents me looking out for myself.'"

Again, on page 338, Lord Halsbury says: "As I have intimated before, I do not deny that a particular consent may be inferred from a general course of conduct. Every sailor who mounts the rigging of a ship knows and appreciates the risk he is encountering. The act is his own, and he cannot be said not to consent to the thing which he himself is doing. And examples might be indefinitely multiplied where the essential cause of the risk is the act of the complaining plaintiff himself, and where, therefore, the application of the maxim *volenti non fit injuria* is completely justified."

§ 177. *Same. Same.*

In Yarmouth *v.* France, 19 Q. B. D. 647, the plaintiff, while in the employ of the defendant as a driver, was kicked by a vicious horse. He knew the horse to be vicious, and had complained of it many times to the defendant's foreman. The foreman told him to go on driving the horse, and that if any accident happened to the plaintiff the employer would be responsible. In an action under the English Employers' Liability Act, it was held by a majority of the court (Lopes, L. J., dissenting) that the fact that the plaintiff remained in the defendant's employ, with knowledge and appreciation of the risk of injury from the horse, did not show as matter of law that he had voluntarily incurred the risk, so as to prevent a recovery under the maxim *volenti non fit injuria;* that the question was one of fact for the jury to determine; and that the jury would have been justified in finding for the plaintiff.

Lindley, L. J., says on page 661: "If nothing more is proved than that the workman saw danger, reported it, but, on being told to go on, went on as before, in order to avoid dismissal, a jury may in my opinion properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of having taken the risk upon himself. Fear of dismissal, rather than voluntary action, might properly be inferred."

In the much-discussed case of Thomas *v.* Quartermaine, 18 Q. B. D. 685, the plaintiff was scalded by falling into a cooling vat in the defendant's brewery, while he was pulling a board from under an adjacent boiling vat. He was employed in the cooling room, in which

there was a cooling vat and a boiling vat, between a part of which the passageway was only three feet wide. The cooling vat had a rim of sixteen inches above the passage, but it was not fenced or railed in. A board which was used as a lid to the cooling vat being under the boiling vat, the plaintiff took hold of it to pull it out: the board stuck; the plaintiff gave a harder pull and the board came out suddenly, causing the plaintiff to fall back into the cooling vat. He had worked in the room for many months, and knew its condition as well as the defendant. In an action under the Employers' Liability Act for failure to fence the vat, it was held by Bowen and Fry, L. JJ. (Lord Esher, M. R., dissenting), that the maxim *volenti non fit injuria* applied to the case, and that therefore there was no sufficient evidence of negligence to warrant a finding for the plaintiff, and the defendant was entitled to judgment. In the opinion of Bowen, L. J., after stating that mere knowledge of the danger by the plaintiff is not a conclusive defence in itself, he adds on page 697: "But when it is a knowledge under circumstances that leave no inference open but one, viz., that the risk has been voluntarily encountered, the defence seems to me complete."

If Thomas *v.* Quartermaine, 18 Q. B. D. 685, decides that the mere fact that the plaintiff continues to work on the defendant's premises after he knows their defective condition is conclusive evidence of his assumption of the risk, and precludes a recovery under the act, although there has been a breach of duty on the defendant's part, the decision can scarcely be reconciled with Smith *v.* Baker, [1891] A. C. 325, and others. It

seems possible, however, to reconcile it with Smith *v.* Baker on the ground that there was no negligence on the part of the defendant. Bowen, L. J., states, near the conclusion of his opinion, on page 699: "There was, therefore, in my opinion, no evidence of negligence on which the county court judge could act, and therefore the appeal should be dismissed with costs." And on pages 702, 703, Fry, L. J., says: "For the reasons I have given I think that there was no negligence of the defendant from which the defect arose, or which was the cause of its not being discovered or remedied; and on this ground I think the defendant is not liable. . . . Further, I think that on the whole of this case there was no evidence to support the finding of the county court judge that there was a defect in the ways due to the negligence of the defendant."

Other parts of the opinions, however, strongly support the view adopted by the reporter in his head-note, namely, that there was no sufficient evidence to warrant a finding of defendant's negligence, *because* the doctrine of *volenti non fit injuria* applied to the case, thus confounding two matters which were held in Smith *v.* Baker to be separate and distinct defences. If there was not sufficient evidence of the defendant's negligence, that ended the case in his favor, and it was unnecessary to consider the other defence founded upon the maxim.

In Baddeley *v.* Granville, 19 Q. B. D. 423, it was decided that where the injury is caused by the breach of an express statutory duty on the defendant's part, as failure to keep a man at the mouth of a coal-pit, the doctrine of *volenti non fit injuria* does not apply to actions under the Employers' Liability Act.

Weblin *v.* Ballard, 17 Q. B. D. 122, goes too far in holding that the English act has entirely abolished the common-law defence of assumption of risk for an injury caused by a defect in the condition of the ways, works, etc., though the ruling that it has abolished the defence of common employment, as applied to the persons mentioned in the act, has been sustained by the later decisions.

§ 178. *Same. Same. Statutory Defects.*

The doctrines of assumption of risk and *volenti non fit injuria* have no application to the case of a breach of a specific statutory duty imposed upon the employer, and the fact that the plaintiff continues in the defendant's employ with knowledge of the breach and without objection will not prevent his recovery under the Employers' Liability Act for an injury caused by such breach. In Baddeley *v.* Granville, 19 Q. B. D. 423, the Coal Mines Regulation Act, 1872, required a banksman to be kept at the mouth of a coal-pit while the miners were going up or down the shaft. The plaintiff's husband was killed while coming out of the shaft at night, through an improper signal given by a boy to the engineer in charge of the cage, no banksman being present as required by the statute. In an action under the Employers' Liability Act, 1880, it was held that the fact that the deceased knew that no banksman was employed by the defendant at night, and continued to work at the mine, did not constitute a defence to the action. Wills, J., says on pages 426, 427: "An obligation imposed by statute ought to be capable of enforcement with respect to all future dealings between

parties affected by it. As to the result of past breaches of the obligation, people may come to what agreements they like; but as to future breaches of it, there ought to be no encouragement given to the making of an agreement between A and B that B shall be at liberty to break the law which has been passed for the protection of A. Such an agreement might be illegal, though I do not hold as a matter of law that it would be so. But it seems to me that if the supposed agreement between the deceased and the defendant, in consequence of which the principle of *volenti non fit injuria* is sought to be applied, comes to this, that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him by statute, and shall connive at his disregard of the statutory obligation imposed on him for the benefit of others as well as of himself, such an agreement would be in violation of public policy and ought not to be listened to. On that ground there is much to be said in favor of the opinion expressed in the Court of Appeal that, where there has been a breach by a defendant of a statutory obligation, the maxim *volenti non fit injuria* has no application." [1]

§ 179. *Same.* (2) *Alabama Rule. Early Cases.*

In Alabama the early cases went to one extreme in holding that knowledge and appreciation of the defect or danger was in no case an assumption of the risk, and that the maxim *volenti non fit injuria* did not apply to actions under the Employers' Liability Act where the

[1] Referring to Thomas *v.* Quartermaine, 18 Q. B. D. 685. See, also, Blamires *v.* Lancashire &c. Ry., L. R. 8 Ex. 283.

employer was aware of the defect and negligently failed to remedy it.[1] The only case in which the maxim was held to apply was when the employee himself created the defect, or consented to its creation by a third person.[2]

In Highland Avenue &c. Ry. *v.* Walters, 91 Ala. 435, a yard-master and conductor was killed by being thrown from the foot-board of an engine on which he was standing, caused, as the plaintiff alleged, by a pile of coal which was left so near the track as to obstruct the passage of the engine. One count was for a defect in the condition of the ways of the railroad, and another was for the negligence of defendant's superintendent in allowing the coal to remain there. The coal belonged to one Peebles, who testified that it was deposited there by permission of the deceased. The chief defence was contributory negligence.

In delivering the court's opinion, Mr. Justice Clopton says, on pages 441, 442: "In railroading there are known perils incident to the service, no matter how well constructed the plant, works, and machinery may be, or how watchful and diligent the control and management of the trains. To these the statute has no application, and of these the employee takes the risk. When, however, an employee sustains injury in the cases and under the conditions specified in the statute, it operates to take from the employer the defence that the employee impliedly contracts to assume the known and ordinary risks incident to his employment. To this extent, and to this extent only, is the common-law rule abrogated. By the provisions of the statute, the em-

[1] Mobile &c. Ry. *v.* Holborn, 84 Ala. 133.

[2] Highland Avenue Ry. *v.* Walters, 91 Ala. 435.

ployer is answerable in damages when the defect in the condition of the ways, works, machinery, or plant arose from, or had not been discovered or remedied owing to the negligence of the employer, or person to whom is entrusted the duty of seeing that they are in proper condition; and is exempted from liability when, not being aware of the defect or negligence, the employee has failed to give information thereof within a reasonable time after discovering it. Under this construction, contributory negligence cannot be imputed to an employee from continuance in the service after merely discovering a defect or negligence, though it may increase the risk of injury. Something more is requisite, — concurring failure to give information thereof within a reasonable time after knowledge of the defect or negligence, unless the employee knows that the employer or superior is already aware of it."

§ 180. *Same. Same. Late Cases.*

But these early cases have since been expressly overruled, and the Alabama court has gone to the opposite extreme, and now holds that an employee who continues in the service with knowledge of a defect in the condition of the ways, works, or machinery, though such defect exists in the ways, works, or machinery of another department over which he has no control, assumes the risk of injury therefrom, after the lapse of a reasonable time for remedying the defect, and that the doctrine of *volenti non fit injuria* applies to prevent a recovery by him, and was not changed by the Employers' Liability Act.[1]

[1] Birmingham Ry. *v.* Allen, 99 Ala. 359.

In this case of Birmingham Ry. *v.* Allen, 99 Ala. 359, a conductor in the employ of the defendant railroad was thrown from his train while on duty by the sudden turn or jerk of the train caused by its running on to a side track from the main track because the switch had been left open. The defect in the switching apparatus was the want of a lock or other sufficient means of fastening the switch. The plaintiff had known of this defect for a year prior to his injury. It was held that the want of a switch-lock was a "defect" within the meaning of the statute, but that the plaintiff, by continuing in the defendant's employ for more than a reasonable time with knowledge of the defect, had assumed the risk of injury incident to such defect; that the maxim *volenti non fit injuria* applied, and that the plaintiff could not recover as matter of law. In this case the court claims to be following the English rule. Smith *v.* Baker, [1891] A. C. 325, is not cited, however, and the decision seems to be contrary to that in Smith *v.* Baker.

The qualifying clause of the statute, providing in substance that an employee shall not recover under the act if he knew of the defect or negligence causing his injury and failed to give notice thereof, was held by the court not to prevent the application of the maxim to the facts of the case, and the reasoning of Bowen, L. J., in Thomas *v.* Quartermaine, 18 Q. B. D. 685, on this point, was said to be "convincing." (Page 374.) Referring to this provision, the court states on pages 374, 375, by Mr. Justice Coleman: "It would seem that the legislature, by a statutory enactment, recognized the application of the maxim of *volenti non fit*

injuria as declared by the court, and, out of abundant caution lest the statute might be construed to give a cause of action absolutely when the defect or negligence specified in the statute was the cause of injury, although the risk of such defect and negligence was voluntarily and knowingly assumed by the employee, added the proviso above referred to."

In the later cases of Louisville &c. Ry. *v.* Banks, 103 Ala. 000; 16 So. Rep. 547, and Louisville &c. Ry. *v.* Stutts, 104 Ala. 000; 17 So. Rep. 29, the doctrine of Birmingham Ry. *v.* Allen, 99 Ala. 359, was reaffirmed, and seems now to be the settled rule in Alabama. In the case of Louisville &c. Ry. *v.* Banks, *supra*, a freight brakeman was knocked off the top of a car by a low bridge and killed. The maintenance of such a bridge was held to be *prima facie* negligence on the part of the railroad company, for which it would have been liable under the statute to one not familiar with the bridge; but inasmuch as the deceased had been warned about the bridge, and had passed under it about one hundred times in the course of his four months' employment, it was held that he had assumed the risk of injury, and that a verdict should have been ordered for the defendant. Mr. Justice Haralson says, on page 549, in delivering the court's opinion: "Another principle which may be considered as finally settled is that if an employee knows of the existence of dangers arising from defects in ways, works, and machinery of the company, and continues in its service after the lapse of a reasonable time for the defects to be remedied or removed, he assumes this additional risk, though not incident to his original employment even."

At common law the employee was deemed to assume the known and ordinary risks incident to his employment. For an injury caused by such dangers he could not recover damages from his employer.

The Alabama Employers' Liability Act abrogates this rule of the common law in part, but not to the extent of making the employer liable for an injury caused by a known danger against which human skill and caution cannot provide. The statute gives the employee no remedy in the latter case; for there is no negligence of the employer, nor of any person for whose negligence the statute makes him liable. "The scope and operation of the statute is to make the employer answerable in damages for an injury caused by his own negligence, or the negligence of a co-employee of the same or superior grade, in the enumerated classes of cases." [1]

§ 181. *Same.* (3) *Massachusetts Rule. Absence of Guard-rail, or other Safety Appliance.*

In Massachusetts the court has been careful to decide each case on its particular facts, and has refrained from announcing any broad or general rules upon this difficult question. The effect of continuing to work with knowledge of the absence of certain safety appliances has, however, been several times decided by this court.

The Massachusetts statute of 1895, ch. 362, relates to railroad corporations and certain defects and dangers in their rolling-stock. Upon this question of assuming the risk of injury by continuing to work with knowledge of the risk, the statute declares in section 7:

[1] Mobile &c. Ry. *v.* George, 94 Ala. 199, 218, per Clopton, J.

"Any employee of such corporation who may be injured by any locomotive, car, or train in use contrary to the provision of this act, shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such corporation after the unlawful use of such locomotive, car, or train has been brought to his knowledge."

In general it may be stated that where the absence of the guard-rail, etc., is known to the employee, and its danger appreciated by him, it constitutes an obvious danger, and, if he is injured thereby, the employer is not liable under the act. By continuing to work on such defective ways, works, or machinery, without giving information thereof, the employee assumes the risk resulting from the absence of the guard or rail; the doctrine of *volenti non fit injuria* applies, and a verdict should be ordered for the defendant.

In O'Maley *v.* South Boston Gas Light Co., 158 Mass. 135, the defect in the defendant's coal-run consisted in not providing guards on the runs, by reason of which the plaintiff alleged that while wheeling coal in a barrow, he fell off the run and was injured. At various times during the previous fifteen years the plaintiff had done the same work, and the runs had been in the same condition. The court held that the plaintiff had assumed the risk, that the maxim *volenti non fit injuria* applied, and that a verdict was properly ordered for the defendant.

In Toomey *v.* Donovan, 158 Mass. 232, the machine had no automatic guard to prevent the head-block from falling down in case the machine got out of order, by reason of which the plaintiff was injured. At the trial

the plaintiff offered to prove that for a long time prior to his injury such guards had been in use upon such machines, and that the defendants knew of them, and that the plaintiff did not. For a part of three years prior to the accident the plaintiff had worked upon a machine like the one upon which he was injured, and he knew that there was no guard. He was twenty-five years old, and, for aught that appeared, of ordinary intelligence. It was held, in an action under the statute, that the testimony offered was properly excluded, for the following reasons, as stated by Mr. Justice Morton for the court on page 237 : —

"The fact that there was no guard was an obvious one; and, in working on the machine, he must be held to have assumed the risk resulting from the absence of a guard. Whether he did or did not know that automatic guards were in use on such machines was immaterial. He agreed to work on the machine as it was, and the defendants owed no duty to him to put on the guard. Having assumed the risk of operating the machine without a guard, the plaintiff cannot now claim that one should have been put on." [1]

In Gleason *v.* New York &c. Ry., 159 Mass. 68, the plaintiff, a switchman, was injured by having his foot caught in a hole in the planking of the defendant's passenger-yard, where he had worked for six weeks. During that time he had been in the habit of throwing the switch at the hole where he was hurt. The hole was there when his employment began, and was perfectly open to view and obvious. In this action under

[1] Citing Pingree *v.* Leyland, 135 Mass. 398, and Moulton *v.* Gage, 138 Mass. 390.

the Employers' Liability Act the jury returned a verdict for the plaintiff; but the full court set it aside, on the ground that the plaintiff must be deemed to have assumed the risk of an obvious danger. Hannah *v.* Connecticut River Ry., 154 Mass. 529, was distinguished on the ground that a temporary hole in the roadbed was formed after the plaintiff's employment began, and had been there but a short time and had not been noticed by him. Under these facts it was held that the plaintiff had not assumed the risk as matter of law, and a verdict in his favor was allowed to stand.

§ 182. *Obvious Danger.*

At common law the rule is well settled that an employee assumes the obvious risks of his employment, and cannot recover for an injury caused by an obvious danger which was known to and appreciated by him.[1] The same rule applies under the Employers' Liability Acts.[2]

In Fisk *v.* Fitchburg Ry., 158 Mass. 238, a freight brakeman, while descending a side ladder, was struck by a projecting awning at one of the defendant's stations and injured. He had been employed by the road about two years, and was acquainted with that station

[1] Goodes *v.* Boston & Albany Ry., 162 Mass. 287; Goldthwait *v.* Haverhill &c. Ry., 160 Mass. 554; Connolly *v.* Eldredge, 160 Mass. 566; Kleinest *v.* Kunhardt, 160 Mass. 230; Wilson *v.* Tremont & Suffolk Mills, 159 Mass. 154; Fitzgerald *v.* Connecticut River Paper Co., 155 Mass. 155; Mahoney *v.* Dore, 155 Mass. 513; Vincennes Water Co. *v.* White, 124 Ind. 376; Naylor *v.* Chicago &c. Ry., 53 Wis. 661; Olson *v.* McMullen, 34 Minn. 94.

[2] Gleason *v.* New York &c. Ry., 159 Mass. 68; O'Maley *v.* South Boston Gas Light Co., 158 Mass. 135; Connelly *v.* Hamilton Woollen Co., 163 Mass. 156; Cassady *v.* Boston & Albany Ry., 164 Mass. 168.

and knew there was an awning there. The awning was of the ordinary kind, and had not been changed for the worse during the plaintiff's term of employment. It was held that the employer was not liable at common law, because the risk was one which the plaintiff must be deemed to have assumed; and that the employer was not liable under the statute, because "the duty of altering the awnings upon its stations was not cast upon the defendant by the enactment of the statute."[1]

In Louisville &c. Ry. *v.* Stutts, 104 Ala. 000; 17 So. Rep. 29, a locomotive engineer, while engaged in shifting cars from a track to a trestle, lost control of his engine, which ran with great speed and force against the stop-block at the end of the trestle, threw him a distance of twenty or thirty feet to the ground, and caused his death. The defects complained of were that the trestle was too high and too short for safety in shifting cars. It was twenty or thirty feet high at the end, and about one hundred and twenty feet long. The uncontradicted evidence showed that one hundred and twenty feet, though somewhat short, was sufficient space within which to handle an engine if done with care, and that the deceased had done it for two weeks without accident at this same place. It was held in an action under the Employers' Liability Act that the dangers were open and obvious to any one of fair intelligence, that the deceased assumed the risk of injury therefrom, and that a verdict should have been ordered for the defendant.

"This rule is especially applicable when the danger does not arise from the defective condition of the per-

[1] Per Allen, J., for the court, at page 239.

manent ways, works, or machinery of the master, but from the manner in which these are used, and when the existence of the danger could not well be anticipated, but must be ascertained by observation at the time."[1]

In Sullivan *v.* Fitchburg Ry., 161 Mass. 125, a trackman was killed by a "wild" engine, so called, *i. e.* one which runs outside of any schedule time. The deceased and several others were engaged in pushing a small platform car upon which they had their tools for repairing the track. The wild engine came around a curve suddenly, and before the deceased could get out of the way he was struck and killed. In an action under the Employers' Liability Act, it appearing that it was a part of the duty of trackmen to look out for "wild" engines, a majority of the court held that the trackmen assumed the risk of such danger, and that the railroad company was not liable.

§ 183. *Same. Ignorance of Plaintiff, and Failure to Warn him of Increased Danger.*

When the danger is not hidden or in the nature of a trap, but is in plain sight of the employee while in the ordinary discharge of his duties, the fact that he did not see the defect or danger, or know of its existence before his injury, is not sufficient to entitle him to go to the jury.[2] Nor does the fact that the plaintiff was

[1] Lothrop *v.* Fitchburg Railroad, 150 Mass. 423, 425, per Field, J.

[2] Thain *v.* Old Colony Ry., 161 Mass. 353; Austin *v.* Boston & Maine Ry., 164 Mass. 282; Lovejoy *v.* Boston & Lowell Ry., 125 Mass. 79; Goldthwait *v.* Haverhill &c. Ry., 160 Mass. 554; Griffin *v.* Ohio &c. Ry., 124 Ind. 326; Hathaway *v.* Michigan Central Ry., 51 Mich. 253; Pederson *v.* Rushford, 41 Minn. 289.

ignorant of the precise extent of the danger,[1] or of the character of the injury he might sustain,[2] prevent the presiding justice from directing a verdict for the defendant, on the ground that the plaintiff had assumed the risk.

In East Tennessee &c. Ry. *v.* Turvaville, 97 Ala. 122, a brakeman, while coupling cars with double buffers, was crushed between them. He had had some experience in coupling cars with single buffers, but none in coupling cars with double buffers, which it appeared were more dangerous to couple; nor did he know before his injury that these cars had double buffers. His injury was received during the first night of his employment. He had received no instruction that double buffers were more hazardous than single ones. In an action under the Employers' Liability Act it was held that the danger was an obvious one, open to the ordinary observation of any one using reasonable care and prudence, and that the failure of the defendant or its yard-master to warn the plaintiff of the increased danger did not render the defendant liable.[3]

So, if a man employed in the car-house of a street railroad company is caught and injured between two long open cars swinging towards each other on a curve at the entrance to the car-house, the fact that the risk was increased after his employment commenced, and only one month before his injury, by the use of long open cars in the place of short closed cars, will not

[1] Connelly *v.* Hamilton Woollen Co., 163 Mass. 156; Flynn *v.* Campbell, 160 Mass. 128.

[2] Feely *v.* Pearson Cordage Co., 161 Mass. 426.

[3] See, also, Louisville &c. Ry. *v.* Banks, 103 Ala. 000; 16 So. Rep. 547; Hathaway *v.* Michigan Central Ry., 51 Mich. 253.

entitle him to go to the jury, and a verdict should be ordered for the defendant, upon the ground that the plaintiff had assumed the risk of an obvious danger if he continued to work without protest or promise of change.[1]

When, however, the defect or danger is concealed,[2] or has existed for a very short time without the employee's knowledge,[3] the plaintiff may be entitled to go to the jury. So, also, when the injured employee is young or inexperienced, and the defendant has omitted to give him proper instructions and warning of an increased danger, the plaintiff may be entitled to go to the jury, even if the increased danger was caused by a fellow-servant.[4] Nor does an employee, even if he is an experienced man, assume the risk of injury caused by a reckless method of doing business adopted by his employer.[5]

§ 184. *Same. Work outside of Ordinary Duty. Finding of Due Care of Plaintiff.*

Even if it be found as a fact by the jury that the plaintiff was in the exercise of due care and diligence at the time of the injury, or that he was not negligent, this does not prevent the court from holding, on the facts, that the danger was an obvious one which the plaintiff voluntarily assumed.

[1] Goldthwait *v.* Haverhill &c. Ry., 160 Mass. 554.

[2] Snow *v.* Housatonic Ry., 8 Allen, 441 ; Ferren *v.* Old Colony Ry., 143 Mass. 197 ; Plank *v.* New York Central &c. Ry., 60 N. Y. 607.

[3] Gustafsen *v.* Washburn & Moen Manuf. Co., 153 Mass. 468 ; Hannah *v.* Connecticut River Ry., 154 Mass. 529.

[4] Bjbjian *v.* Woonsocket Rubber Co., 164 Mass. 214.

[5] Caron *v.* Boston & Albany Ry., 164 Mass. 523.

In Mellor *v.* Merchants' Manuf. Co., 150 Mass. 362, a loom-fixer was injured by a belt slipping off a pulley while he was attempting to repair a defect. This work was outside his ordinary duty, and was undertaken at the suggestion of a fellow-workman, and with the mere consent of his immediate superior. The jury found a general verdict for the plaintiff, which included a finding that he was in the exercise of due care and diligence. The court assumed for the purposes of that case that this finding was conclusive upon the court, but held, nevertheless, that the plaintiff could not recover, for the reason that the plaintiff voluntarily took the risk of an obvious danger. Mr. Justice Holmes, in delivering the opinion, says, "The statute does not put servants in a better position than that of the most favored persons who are not servants" (page 364), and quotes with approval an illustration put by Bowen, L. J., in Thomas *v.* Quartermaine, 18 Q. B. D. 685, 695, in these words: "I employ a builder to mend the broken slates upon my roof and he tumbles off. Have I been guilty of any negligence or breach of duty towards him? Was I bound to erect a parapet round my roof before I had its slates mended?"

A like rule prevails at common law.[1]

§ 185. *Understanding and Appreciation of Danger.*

In order to constitute such an assumption of risk as will prevent a recovery for negligence, it must appear that the employee understood and appreciated the danger to which he was exposed. If this does not appear, this ground is no defence for the employer,

[1] Stuart *v.* West End Ry., 163 Mass. 391.

either at common law[1] or under the Employers' Liability Acts.[2]

In Prendible *v.* Connecticut River Manuf. Co., 160 Mass. 131, the plaintiff was injured by the fall of a staging, caused either by its defective condition or its overloading by order of the defendant's superintendent. The plaintiff had been in America about ten years, and had worked about a year and a half in a mill-yard and seven years in a dye-house before he was employed by the defendant. He had never had anything to do with the building of stagings. At the time of his injury he was ordered to get upon the staging to pile up wood, and as soon as he stepped upon it it fell. In an action under the act, it was held that "it did not appear that the plaintiff understood and appreciated the danger of injury from working on the staging so far that he can be said to have assumed the risk." Per Knowlton, J., page 139.

In Lynch *v.* Allyn, 160 Mass. 248, an inexperienced workman was injured by the falling of a bank of earth upon him while he was engaged in undermining it by picking at the bottom. The bank was composed of hard-pan and clay and some sand, and was from eight to ten feet high and fifteen or twenty feet long. The bank was not expected to fall by the force of gravitation, but was to be pried over from the top by bars after a proper depth had been picked out at the bottom. In an action under the Employers' Liability Act

[1] Bjbjian *v.* Woonsocket Rubber Co., 164 Mass. 214; Fitzgerald *v.* Connecticut River Paper Co., 155 Mass. 155; Mahoney *v.* Dore, 155 Mass. 513; Patnode *v.* Warren Cotton Mills, 157 Mass. 283.

[2] Prendible *v.* Connecticut River Manuf. Co., 160 Mass. 131; Coan *v.* Marlborough, 164 Mass. 206.

the defendant claimed that the danger was obvious, and that the presiding judge should have so ruled. The full court held, however, that the question was one for the jury. Mr. Justice Lathrop, in delivering the opinion of the court, says on pages 253, 254 : —

"While we have no doubt of the power and of the duty of the court in a case either at common law or under the statute of 1887, ch. 270, where the peril is obvious, so to rule, as matter of law, yet we are of opinion in this case that, on the evidence, the question was for the jury. The case was not one where a man was set to work to undermine a bank which was expected to fall by the law of gravitation, and where he was expected to look out for himself. In such a case we should have no doubt that the danger would be obvious.[1] In the case at bar it appears from the testimony of the defendant's superintendent that the way this bank was to be taken down was by picking at the bottom until a proper depth was reached, and then to pry the top over with bars ; that he knew there was sand in the bank, and that such a bank is more liable to fall than a clay bank; that he meant to guard against it ; and that when he left he intended to come back very soon. . . . On the evidence, we do not think that the danger of the bank falling was so obvious that the judge ought to have given the ruling requested."

In Coan *v.* Marlborough, 164 Mass. 206, a common laborer, while digging a trench, was injured by the sides caving in, due to a failure to brace them properly and to blasting rock in the bottom of the trench. The

[1] Citing Griffin *v.* Ohio &c. Ry., 124 Ind. 326, and Swanson *v.* Lafayette, 134 Ind. 625.

plaintiff had worked much in such trenches and knew that the trench was not close-sheathed; that portions of its sides were not covered; that blasting was done to remove rock at the bottom; that small quantities of earth frequently fell from the sides, and the nature of the soil and the depth of the trench. In an action under the Employers' Liability Act of Massachusetts, Statute 1887, ch. 270, § 1, cl. 1, it was held that these facts were not conclusive that plaintiff appreciated the risk, and that a verdict in his favor was proper. Mr. Justice Barker thus states the reasons on page 207: "The plaintiff was a common laborer, working where he was told to work, and having no discretion as to where he should stand. He had a right to rely upon the inspection of the shoring, and of the condition of the sides of the trench, made by his superiors after each blast before allowing the workmen again to enter the trench, and he was not charged with the decision of the question whether there was danger. Neither the fact that inconsiderable quantities of earth were frequently falling, nor his experience in trenches, can be said to show, as matter of law, that he appreciated the danger."[1]

§ 186. *Same. Young and Inexperienced Employees.*

The rule that the employee must understand and appreciate the danger in order to prevent a recovery is peculiarly applicable to young and inexperienced persons who are engaged to work upon or near dangerous machinery. In the case of such persons the employer

[1] See, also, Burgess *v.* Davis Sulphur Ore Co., 165 Mass. 71; 42 N. E. Rep. 501.

is held to a more strict accountability than in the case of persons of full age and experience. A young or inexperienced person will not be held to have assumed some risks which a person of experience or full age would be held to have assumed. The facts of these cases, however, are generally so complex that it seems inexpedient to do much more than cite the cases.[1]

In Mary Lee Coal Co. *v.* Chambliss, 97 Ala. 171, a locomotive fireman, aged 17 years, with no experience in throwing switches, was injured while throwing a switch in obedience to the orders of his engineer, the regular switchman being absent from duty. In an action under the Alabama act, the court, by Mr. Justice Coleman, says, on page 178: "An employee by his agreement assumes the ordinary risks incident to and within the scope of his employment. He may be presumed to know these when he enters into his contract. This general rule will not apply when the employee is young and inexperienced, and these facts are known at the time to the employer." [2]

[1] Coombs *v.* New Bedford Cordage Co., 102 Mass. 572; O'Connor *v.* Adams, 120 Mass. 427; Sullivan *v.* India Manuf. Co., 113 Mass. 396; Wilson *v.* Steel Edge Stamping Co., 163 Mass. 315; Patnode *v.* Warren Cotton Mills, 157 Mass. 283; Ciriack *v.* Merchants' Woollen Co., 146 Mass. 182, and 151 Mass. 152; Coullard *v.* Tecumseh Mills, 151 Mass. 85; Probert *v.* Phipps, 149 Mass. 258; Crowley *v.* Pacific Mills, 148 Mass. 228; Pratt *v.* Prouty, 153 Mass. 333; Hanson *v.* Ludlow Manuf. Co., 162 Mass. 187; Siddall *v.* Pacific Mills, 162 Mass. 378; Bjbjian *v.* Woonsocket Rubber Co., 164 Mass. 214; 41 N. E. Rep. 265; Louisville &c. Ry. *v.* Boland, 96 Ala. 626; Hathaway *v.* Michigan Central Ry., 51 Mich. 253; Railroad Co. *v.* Fort, 17 Wall. 553.

[2] Citing Williams *v.* South & North Alabama Ry., 91 Ala. 635, 640.

§ 187. *Assumption of Risk by Minor Employee.*

Beach on Contributory Negligence (2d ed. § 357) contains a vigorous argument in favor of the view that a minor employee should not be deemed to have assumed the risks of the employment, because the doctrine is founded upon an implied contract, and that minors are not bound even by express contracts with their employers, much less by implied contracts. The adjudications, however, are strongly to the contrary, especially in Massachusetts and Alabama.[1] The Alabama court places its decision upon the ground that such a contract is not void but merely voidable, and that the bringing of an action for an injury, caused by some specific negligence committed in the course of the business, amounts to an adoption or ratification of the voidable contract, and subjects the minor to the same rules which govern in actions by adult employees. The same case, however, contains a dictum by Mr. Justice Head, which indicates that the doctrine has been somewhat modified by the Employers' Liability Act. Thus he says: "In cases under our statute known as the Employers' Liability Act, which renders actionable against the employer the negligence of fellow-servants in certain specified cases, the age of the injured party might be material in evidence to give character to the act of the servant charged as negligent, or exert

[1] King *v.* Boston &c. Ry., 9 Cush. 112; Curran *v.* Merchants' Manuf. Co., 130 Mass. 374; Siddall *v.* Pacific Mills, 162 Mass. 378; Harris *v.* McNamara, 97 Ala. 181, 182, 183; Fisk *v.* Central Pacific Ry., 72 Cal. 38; Brown *v.* Maxwell, 6 Hill, 592; Gartland *v.* Toledo &c. Ry., 67 Ill. 498.

an influence upon the question of contributory negligence when that defence is interposed." [1]

That the doctrine that an employee assumes the risks of his employment is based upon an implied contract between employer and employee, both at common law [2] and under the Employers' Liability Act,[3] has been held in some jurisdictions; but the better view seems to be that the doctrine is founded upon considerations of public policy not dependent upon contract, and that a minor employee, if of sufficient understanding to appreciate the risk incurred, is bound by the rule.[4] This view is also supported by the decisions holding that a workman may assume the risks of his employment, so as to prevent a recovery from the owner or lessee of premises for injuries caused by an obvious danger therein, when there is no contractual relation between the two persons.[5] It likewise receives some support from the cases which decide that an employee who is injured while engaged upon work outside of his regular duties may be deemed to have assumed the risk of injury, irrespective of any implied term in his contract of service, and cannot recover of his employer either under the Employers' Liability Act, or at common law.[6]

[1] Harris *v.* McNamara, 97 Ala. 181, 183.

[2] Priestley *v.* Fowler, 3 M. & W. 1; Wilson *v.* Merry, L. R. 1 H. L. Sc. 326; Griffin *v.* Ohio &c. Ry., 124 Ind. 326, 327, and cases cited; Siddall *v.* Pacific Mills, 162 Mass. 378, 382.

[3] Griffiths *v.* Dudley, 9 Q. B. D. 357.

[4] De Graff *v.* New York Central &c. Ry., 76 N. Y. 125; Railroad Co. *v.* Fort, 17 Wall. 553, 557.

[5] Wood *v.* Locke, 147 Mass. 604; Goddard *v.* McIntosh, 161 Mass. 253.

[6] Mellor *v.* Merchants' Manuf. Co. 150 Mass. 362; Stuart *v.* West End Ry., 163 Mass. 391.

B. NEGLIGENCE OF A SUPERINTENDENT.

§ 188. *No Assumption of Risk from Superintendent's Negligence under the Statute.*

An employee does not assume the risk arising from the negligence of a person entrusted by the employer with and exercising superintendence. To apply the doctrine of assumption of risk to such a case would defeat the purpose of the statute. If the injury be caused by the negligence of a superintendent, the employer is liable under the act.

Thus, in Davis *v.* New York &c. Ry., 159 Mass. 532, the plaintiff was run down by a train while he was repairing a track for the defendant. The work required him to bend over, facing the north, so that he had to rely upon the warning of the section boss of the approach of trains from the south. At the trial the evidence was conflicting as to whether the section boss gave the usual warning, but the jury found a verdict for the plaintiff. At the argument before the full court the defendant contended that the plaintiff must be considered to have assumed the risk of the section boss's failure to warn him of approaching trains. But the court held otherwise, and in the course of an opinion by Holmes, J., said: "A workman does not take the risk that a person entrusted by his employer with and exercising superintendence will be negligent in the exercise of that duty. If he were held to do so, the statute would be made of no avail."[1] Page 536.

[1] See, also, Smith *v.* Baker, [1891] A. C. 325; Lynch *v.* Allyn, 160 Mass. 248; Hennessy *v.* Boston, 161 Mass. 502.

In Malcolm *v.* Fuller, 152 Mass. 161, a workman was injured by an explosion while in the act of drilling out a blast in a stone quarry under the direction of the defendant's superintendent. The injury was caused by reason of the superintendent's negligence, and the defendant contended that such negligence was one of the risks which the plaintiff assumed when he entered upon the service, and that therefore he could not recover. This was true at common law in Massachusetts.[1] But the court held that the Employers' Liability Act changed the common-law rule upon this point, and made the defendant responsible for such negligence. If the negligence of the defendant's superintendent can fairly be found to be the cause of the plaintiff's injury, a verdict for the plaintiff is proper, notwithstanding the fact that the injury was attended by certain obvious risks which he must be deemed to have assumed. Thus, in McPhee *v.* Scully, 163 Mass. 216, the plaintiff, while in the defendant's employ, had his hand crushed in a pile-driver. When the accident happened the plaintiff was standing aloft on a joist, swinging and steadying a pile to put it in position. The driving-hammer was five feet above him, held in place by a chocking-block. In the course of his work he put his left hand on top of the pile, directly in the line of descent of the hammer, and at this instant the hammer fell and caused the injury. There was no defect in the pile-driver, and the cause of the hammer's fall was the accidental pulling away of the chocking-block by the strain of the gypsy-fall, which a drunken fellow-workman who held the fall negligently allowed

[1] Kenney *v.* Shaw, 133 Mass. 501.

to get over the block in such a way that when made taut it pulled the block out from under the hammer. The block projected about three inches beyond the outer face of the upright beam, and it was obvious that the gypsy-fall might get over the projecting end of the block and cause the hammer to fall. The defendant's foreman or superintendent in charge of the work gave the order to "hoist again" after the fall had become foul of the block and immediately before the accident, and the intoxication of the workman who held the fall was evident. In this action under the Employers' Liability Act it was held that the plaintiff had not assumed the risk of injury from the superintendent's negligence in giving the order to "hoist again" at that time, and in allowing the fall to be handled by a drunken workman, and that a verdict for the plaintiff was justified by the evidence.

Under the Massachusetts Employers' Liability Act it cannot be ruled as matter of law that an inexperienced workman who is engaged in undermining a bank of earth assumes the risk attendant upon the temporary absence of the superintendent, whose duty it is to warn him of danger. If he is injured by the falling of the bank during such absence, the fact that he knew of the superintendent's absence and continued to work without objection will not prevent his recovery. The question is at least one for the jury to determine.[1]

§ 189. *Common-Law Rule.*

At common law the employee was held to assume the risk of injury from the negligence of a superintend-

[1] Lynch *v.* Allyn, 160 Mass. 248.

ent,[1] as well as from an obvious defect in the condition of the ways, works, or machinery,[2] and could not recover of his employer in either case. Thus, in Albro *v.* Agawam Co., 6 Cush. 75, a spinner was injured through the negligence of a superintendent. In an action at common law it was held that the common employer was not liable in damages to the spinner, for the following reasons, as stated by Mr. Justice Fletcher for the court on pages 76, 77: "This case cannot be distinguished in principle from the case of Farwell *v.* Boston & Worcester Railroad, 4 Met. 49; and the same point has been since adjudged in the case of Hayes *v.* Western Railroad, 3 Cush. 270. The principle of these decisions is, that when one person engages in the service of another he undertakes, as between him and his employer, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of others in the service of the same employer, whenever he, such servant, is acting in the discharge of his duty to his employer, who is the common employer of both. . . . It cannot affect the principle that the duties of the superintendent may be different, and perhaps may be considered as of a somewhat higher character than those of the plaintiff. . . . The plaintiff and the superintendent must be considered as fellow-servants within the principle and meaning of the cases above referred to, and the other adjudged cases on this subject."

So, in Zeigler *v.* Day, 123 Mass. 152, where a laborer,

[1] Moody *v.* Hamilton Manuf. Co., 159 Mass. 70; Kalleck *v.* Deering, 161 Mass. 469; Zeigler *v.* Day, 123 Mass. 152; Albro *v.* Agawam Co., 6 Cush. 75; Floyd *v.* Sugden, 134 Mass. 563.

[2] Rooney *v.* Sewall Cordage Co., 161 Mass. 153; Goldthwait *v.* Haverhill &c. Ry., 160 Mass. 554.

while digging a sewer trench, was injured through the negligence of a superintendent, it was held that he could not recover of the common employer, because "such negligence is regarded as among the ordinary risks of the employment in which he was engaged." [1]

A like rule has been applied to the negligence of a mate or captain of a vessel in harbor; and in actions at common law against the owner of the vessel for personal injuries to a common sailor, it has been decided that the mate and captain were no more than fellow-servants with the sailor, and that the latter assumed the risk of injury from their negligence, and could not recover of the common employer.[2]

At common law, in Massachusetts and elsewhere, an employee who, knowing that his foreman was incompetent, continued to work under him and made no complaint to the employer, was deemed to have assumed the risk, and could not maintain an action against the employer for an injury caused by the negligence of the foreman.[3]

C. NEGLIGENCE OF ONE HAVING CHARGE OR CONTROL OF SIGNAL, SWITCH, LOCOMOTIVE ENGINE, OR TRAIN UPON A RAILROAD.

§ 190. An employee of a railroad company does not assume the risk of the negligence of "any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine, or train

[1] Per Colt J., for the court, page 153.

[2] Kalleck *v.* Deering, 161 Mass. 469; Benson *v.* Goodwin, 147 Mass. 237; Loughlin *v.* State, 105 N. Y. 159; Hedley *v.* Pinkney Steamship Co., [1892] 1 Q. B. 58.

[3] Hatt *v.* Nay, 144 Mass. 186; Davis *v.* Detroit &c. Ry., 20 Mich. 105; Frazier *v.* Pennsylvania Ry., 38 Pa. St. 104.

upon a railroad." The Massachusetts statute makes the railroad company liable to its employees for the negligence of such persons, and if the common-law doctrine of assumption of risk were applied to such cases the statute would be nullified. An employee may therefore recover of the railroad company for an injury caused by such negligence.[1]

[1] Steffe *v.* Old Colony Ry., 156 Mass. 262.

CHAPTER XV.

CONFLICT OF LAWS.

Section
191. Action outside the State of injury upon statute of the State of injury.
192. Same. Not necessary that the State of process should give a remedy for such injury.
193. Public policy.
194. Such statutes are not "penal" laws.
195. Statute of State of process does not apply to injuries caused and received outside of that State.
196. Negligence in one State causing injury in another State.
197. Injuries received on navigable waters.
198. Limit of damages recoverable and distribution thereof.
199. Procedure governed by *lex fori*.

§ 191. *Action outside the State of Injury upon Statute of the State of Injury.*

In most jurisdictions the rule is now firmly established that an action for personal injuries received in one State may be maintained in another State, or in the federal courts sitting in another State, founded upon a statute of the former State, unless such statute is contrary to the public policy of the latter State.[1]

In the leading case of Dennick *v.* Railroad Co., 103 U. S. 11, the plaintiff's intestate was instantly killed in

[1] Hilton *v.* Alabama &c. Ry., 97 Ala. 275; Knight *v.* West Jersey Ry., 108 Pa. St. 250; Higgins *v.* Central New England Ry., 155 Mass. 176; Herrick *v.* Minneapolis &c. Ry., 31 Minn. 11; Chicago &c. Ry. *v.* Doyle, 60 Miss. 977; Morris *v.* Chicago &c. Ry., 65 Iowa, 727; McLeod *v.* Connecticut &c. Ry., 58 Vt. 727; South Carolina Ry. *v.* Nix, 68 Ga. 572; Missouri Pacific Ry. *v.* Lewis, 24 Neb. 848; McDonald *v.* McDonald, 28 S. W. Rep. (Ky.) 482.

New Jersey through the negligence of the defendant railroad company. A statute of New Jersey gave an administrator a right of action in such case against the railroad company, for the benefit of the widow and next of kin. The plaintiff, the widow of the deceased, was appointed administratrix in New York, and the action was brought in a court of that State, and afterwards removed by the defendant, on the ground of diverse citizenship, to the Circuit Court of the United States for the District of New York. The trial court ruled that the plaintiff could not recover in New York under the New Jersey statute. In reversing this judgment, the Supreme Court, speaking through Mr. Justice Miller, says on pages 17 and 18: —

"It can scarcely be contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the State where the offence was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury. It is, indeed, a right dependent solely on the statute of the State; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process, or by voluntary appearance, as was the case here. It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right. Whenever, by

either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."

This rule has been reaffirmed several times by the Supreme Court of the United States.[1] Some of the state courts whose earlier decisions were of a contrary tendency have since this decision either overruled or modified them so as to conform to this rule.[2]

§ 192. *Same. Not Necessary that the State of Process should give a Remedy for such Injury.*

Where the State of injury gives a right of action for the personal injury received, it is not necessary to a recovery that the State of process should concur in giving a remedy for a like injury within its limits. The authorities, however, are not uniform upon this subject. In the recent case of Walsh *v.* New York &c. Ry., 160 Mass. 571, a railroad employee was injured in Connecticut by the negligence of a car-inspector in failing to discover a broken draw-bar on a foreign car which the defendant was forwarding. At the time when the injury was received, before the passage of the Massachusetts statute 1893, ch. 359, the plaintiff could not have recovered in Massachusetts if the injury had been received in that State.[3] But by the law of Connecticut,

[1] Texas &c. Ry. *v.* Cox, 145 U. S. 593; Huntington *v.* Attrill, 146 U. S. 657, 674; Northern Pacific Ry. *v.* Babcock, 154 U. S. 190.

[2] Higgins *v.* Central New England Ry., 155 Mass. 176, 178, modifying Richardson *v.* New York Central Ry., 98 Mass. 85.

[3] Mackin *v.* Boston & Albany Ry., 135 Mass. 201; Coffee *v.* New York &c. Ry., 155 Mass. 21.

as proved at the trial and found by the jury, the plaintiff could recover in that State. The Massachusetts court held that he could recover in Massachusetts, upon the principles of interstate comity. Mr. Justice Holmes, in delivering the opinion of the court, says: —

"We are of opinion that, as between the States of this Union, when a transitory cause of action has vested in one of them under the common law as there understood and administered, the mere existence of a slight variance of view in the forum resorted to, not amounting to a fundamental difference of policy, should not prevent the enforcement of the obligation admitted to have arisen by the law which governed the conduct of the parties." Pages 572, 573.

As stated by the Supreme Court of the United States, it was decided in Dennick *v.* Railroad Co., 103 U. S. 11, that "a statute of a State . . . might be enforced in a Circuit Court of the United States held in another State, *without regard to the question whether a similar liability would have attached for a similar cause in that State.*" [1]

In England, however, and in a few of the state courts, the rule appears to be that no action can be maintained outside of the State of injury unless the law of the State of process concurs with the law of the place of injury in giving a right of action.[2] With respect to the English cases just cited, see the opinion

[1] Huntington *v.* Attrill, 146 U. S. 657, 675.

[2] The Halley, L. R. 2 P. C. 193, 204; The M. Moxham, 1 P. D. 107, 111; Phillips *v.* Eyre, L. R. 6 Q. B. 1, 28, 29; Ash *v.* Baltimore &c. Ry., 72 Md. 144; Vawter *v.* Missouri Pacific Ry., 84 Mo. 679 (but see Stockman *v.* Terre Haute &c. Ry., 15 Mo. App. 503); Anderson *v.* Milwaukee &c. Ry., 37 Wis. 321.

of Mr. Justice Holmes in Walsh *v.* New York &c. Ry., 160 Mass. 571, 572, where he says: "Possibly, when it becomes material to scrutinize the question more closely, the English law will be found to be consistent with our views."

§ 193. *Public Policy.*

Although it is true in general, as shown in § 192, that it is not necessary to a recovery that the laws of the State of injury and of the State of process should concur in giving a remedy for the negligent act, yet it is also well settled that no recovery can be had if the right given by the State of injury is contrary to the public policy of the State of process. The only doubtful question is, what is or is not contrary to the public policy of the State of process?

In the first place, it is very clear that the mere fact that no statute exists in the State of process, conferring a right of action for the injury received in another State, does not render the statute of such other State contrary to the public policy of the former State, nor prevent its enforcement therein.[1]

In Herrick *v.* Minneapolis &c. Ry., 31 Minn. 11, it was held that a railroad employee who had received an injury in Iowa, in consequence of the negligence of a fellow-servant, could recover in Minnesota under the Iowa statute, although he could not have recovered there if the injury had been received in that State. In delivering the opinion of the court, Mr. Justice Mitchell says, on pages 14, 15: —

[1] Herrick *v.* Minneapolis &c. Ry., 31 Minn. 11; Walsh *v.* New York &c. Ry., 160 Mass. 571; Texas &c. Ry. *v.* Cox, 145 U. S. 593; Northern Pacific Ry. *v.* Babcock, 154 U. S. 190, 198.

"But it by no means follows that, because the statute of one State differs from the law of another State, therefore it would be held contrary to the policy of the laws of the latter State. . . . To justify a court in refusing to enforce a right of action which accrued under the laws of another State, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens. If the State of Iowa sees fit to impose this obligation upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens."

An action may be brought in one State for a personal injury received in another State whose statute gives a right of action therefor, if the laws of the two States are substantially alike; it is not essential that the statutes should be precisely the same.[1]

Where, however, the action is brought by a domestic executor or administrator for an injury received in another State resulting in the death of his testator or intestate, and a statute of the State of process prohibits an executor or administrator from bringing an action for injuries to the person of the deceased, it has been held that he cannot maintain an action under the foreign statute, because he is bound by the laws of the State of his appointment, and cannot exercise any rights contrary to those conferred by that State.[2] Nor can an

[1] Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48.

[2] Vawter *v.* Missouri Pacific Ry., 84 Mo. 679.

executor or administrator appointed in a State having such a law maintain an action in another State, although the killing occurred in the latter State and its statutes give a remedy therefor, and a foreign executor or administrator is allowed to sue in its courts. The reason assigned is that an administrator takes such powers only as are conferred by the laws of the appointing State, and cannot exercise any greater powers in another State.[1] Upon analogous grounds it has also been decided that a domestic administrator or executor could not maintain an action for an injury to the person of his deceased, under a foreign statute, which was not permitted by the statutes of his own appointing State, although they did not expressly prohibit him from so doing; he must be able to show that the laws of his State entitle him to recover, and it is not sufficient for him to show that they do not prohibit his recovery.[2]

§ 194. *Such Statutes are not "Penal" Laws.*

"The courts of no country execute the penal laws of another."[3] Hence the federal courts have no power to execute the penal laws of the individual States,[4] even if the liability has been reduced to judgment; for "the essential nature and real foundation of a cause of action are not changed by recovering judgment upon it."[5]

[1] Limekiller *v.* Hannibal &c. Ry., 33 Kans. 83.

[2] Taylor *v.* Pennsylvania Ry., 78 Ky. 348; Ash *v.* Baltimore &c. Ry., 72 Md. 144.

[3] The Antelope, 10 Wheat. 66, 123, per Marshall, C. J.

[4] Huntington *v.* Attrill, 146 U. S. 657, 673; Gwin *v.* Breedlove, 2 How. 29, 36, 37; Gwin *v.* Barton, 6 How. 7.

[5] Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 292, 293, disapproving Spencer *v.* Brockway, 1 Ohio, 259; Healy *v.* Root, 11 Pick. 389, and Indiana *v.* Helmer, 21 Iowa, 370.

Nor can the state courts enforce the penal laws of the United States,[1] nor of sister States.[2]

A penal law in this sense has been thus defined by Mr. Justice Gray, speaking for the court in Huntington *v.* Attrill, 146 U. S. 657, 673, 674: —

"The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act. There could be no better illustration of this than the decision of this court in Dennick *v.* Railroad Co., 103 U. S. 11."

It follows from the distinction pointed out in the preceding quotation that a state Employers' Liability Act which enlarges the common-law liability of employers for personal injury, and gives an employee a right of action for negligence which he did not possess before the passage of the statute, is not a penal law in the international sense, so as to prevent its enforcement in the courts of other States or in the federal courts. To give effect to such a statute of another State is not to administer a punishment imposed upon an offender against the State, but merely to afford a private remedy to an employee who has been injured by the negligent

[1] State *v.* Pike, 15 N. H. 83; Ely *v.* Peck, 7 Conn. 239; Ward *v.* Jenkins, 10 Met. (Mass.) 583, 587; Delafield *v.* Illinois, 2 Hill (N. Y.), 159, 169; Scoville *v.* Canfield, 14 Johns. (N. Y.) 338; United States *v.* Latrop, 17 Johns. (N. Y.) 4.

[2] Davis *v.* New York &c. Ry., 143 Mass. 301; Commonwealth *v.* Green, 17 Mass. 515, 540, 541; Scoville *v.* Canfield, 14 Johns. (N. Y.) 338; State *v.* Knight, Taylor (N. C.), 65.

act. Such a statutory right will therefore be enforced in other States upon the principles of interstate comity, unless it is repugnant to their public policy.

The facts that the statute limits the amount recoverable to a certain sum, and, in case the injury results in death, provides for its payment to the widow, or next of kin, or other person, thereby withdrawing the fund from the assets for the payment of debts, and from the operation of the will of the injured person, do not render the action one for the recovery of a penalty, so as to prevent its enforcement in another State.[1]

In Adams *v.* Fitchburg Ry., 67 Vt. 76, it was held, however, that § 212 of Mass. Pub. Stats. ch. 112, was penal and not enforcible in Vermont, chiefly because it declares that the amount recoverable in case of death shall be not less than $500.

§ 195. *Statute of State of Process does not apply to Injuries caused and received outside of That State.*

An Employers' Liability Act, or other similar statute of one State, does not give a right of action for a personal injury caused and received in another State, unless such intention is clearly expressed in the statute. Its operation is confined to the enacting State. An employee who is injured in another State cannot recover under the Employers' Liability Act of his own State.[2]

[1] Higgins *v.* Central New England &c. Ry., 155 Mass. 176, 181.

[2] Alabama Great Southern Ry. *v.* Carroll, 97 Ala. 126.

To the same effect, under similar statutes, are the cases of McCarthy *v.* Chicago &c. Ry., 18 Kans. 46 ; Nashville &c. Ry. *v.* Foster, 10 Lea (Tenn.), 351 ; Chicago &c. Ry. *v.* Doyle, 60 Miss. 977 ; Kahl *v.* Memphis &c. Ry., 95 Ala. 337 ; Le Forest *v.* Tolman, 117 Mass. 109 ; Willis *v.*

In the Alabama case above cited[1] a freight brakeman received an injury in Mississippi by reason of the negligence of an inspector in Alabama in failing to discover a defective link in a foreign car. Under the Alabama Employers' Liability Act the employee could have recovered if the injury had occurred in that State. In Mississippi there was no such statute, and by its common law the inspector and brakeman were considered fellow-servants, for whose negligence the common employer was not liable to either for the other's act. The Alabama court held that the plaintiff could not recover under the statute.

In delivering the opinion of the court in Alabama &c. Ry. *v.* Carroll, 97 Ala. 126, 134, Mr. Justice McClellan says: —

"Section 2590 of the Code, in other words, is to be interpreted, in the light of universally recognized principles of private international or interstate law, as if its operation had been expressly limited to this State, and as if its first line read as follows: 'When a personal injury is *received in Alabama* by a servant or employee,' etc., etc. The negligent infliction of an injury here under statutory circumstances creates a right of action here, which, being transitory, may be enforced in any other State or country the comity of which admits it; but for an injury inflicted elsewhere than in Alabama our statute gives no right of recovery, and the aggrieved party must look to the local law to ascertain what his rights are."

Missouri Pacific Ry., 61 Texas, 432; Hover *v.* Pennsylvania Ry., 25 Ohio St. 667; Needham *v.* Grand Trunk Ry., 38 Vt. 294; Smith *v.* Condry, 1 How. 28; s. c., 17 Pet. 20; Phillips *v.* Eyre, L. R. 4 Q. B. 225, 239, and L. R. 6 Q. B. 1.

[1] Alabama Great Southern Ry. *v.* Carroll, 97 Ala. 126.

The fact that the person injured in another State is a citizen of the State of process, or that the contract was made in the State of process, does not alter the result. The statute of the State of process will not be construed to apply to an injury received outside the State, and no action can be maintained upon it therein unless such intention is clearly and unequivocally expressed in the statute.[1]

In Whitford *v.* Panama Ry., 23 N. Y. 465, the plaintiff's intestate was killed in New Granada while crossing the Isthmus of Panama as a passenger of the defendant railroad company. The action was brought under the New York statutes of 1847 and 1849 giving a right of action for a wrongful act, neglect, or default resulting in death. The corporation was chartered by New York for the purpose of operating a railroad in New Granada, and the contract for carriage was made in New York. It was held that the action could not be maintained because the New York statutes did not apply where the injury was committed or received outside of that State.

Where the common law of the State of process gives no remedy for a personal injury, the presumption in that State is that the same rule prevailed in the other State where the injury occurred. The fact that the State of process has given a remedy by statute does not create a presumption that a remedy existed in the other State, either at common law or by statute. The plaintiff must allege and prove that the law of the

[1] McCarthy *v.* Chicago &c. Ry., 18 Kans. 46; Needham *v.* Grand Trunk Ry., 38 Vt. 294; Whitford *v.* Panama Ry., 23 N. Y. 465; State *v.* Pittsburgh &c. Ry., 45 Md. 41.

State of injury gave a remedy for the injury, otherwise he will fail in his action.[1]

The rule, however, that such statutes do not apply to injuries received in other States is merely a matter of statutory construction and not of constitutional power, at least where the injured person is a citizen of the State. "It is no doubt within the competency of the legislature to declare that any wrong which may be inflicted upon a citizen of New York abroad may be redressed here, according to the principles of our law, if the wrong-doer can be found here, so as to be subjected to the jurisdiction of our courts."[2] The court then proceeds to state the reasons for confining the operation of the statute to injuries received in New York.[3]

The Employers' Liability Act of Indiana, Acts of 1893, ch. 180, § 4, expressly declares that —

"Section 4. In case any railroad corporation which owns or operates a line extending into or through the State of Indiana, and into or through another or other States, and a person in the employ of such corporation, a citizen of this State, shall be injured, as provided in this act, in any other State where such railroad is owned or operated, and a suit for such injury shall be brought in any of the courts of this State, it shall not be competent for such corporation to plead or prove the decisions or statutes of the State where such person shall have been injured as a defence to the action brought in this State."

[1] Debevoise *v.* New York &c. Ry., 98 N. Y. 377; State *v.* Pittsburgh &c. Ry., 45 Md. 41; Selma &c. Ry. *v.* Lacy, 43 Ga. 461; Hyde *v.* Wabash &c. Ry., 61 Iowa, 441; Nashville &c. Ry. *v.* Eakin, 6 Coldw. (Tenn.) 582; McCarthy *v.* Chicago &c. Ry., 18 Kans. 46, 49.

[2] Denio, J., in Whitford *v.* Panama Ry., 23 N. Y. 465, 471.

[3] See, also, Needham *v.* Grand Trunk Ry., 38 Vt. 294.

§ 196. *Negligence in One State causing Injury in Another State.*

Even if the Employers' Liability Act of the State in which the negligence occurs gives a remedy therefor, it has been held that no action can be maintained therein if the injury is received in another State where no remedy exists. This point was directly decided in Alabama Great Southern Ry. *v.* Carroll, 97 Ala. 126, which was an action under the Alabama Employers' Liability Act for an injury received in Mississippi caused by negligence committed in Alabama.

In answer to the argument that the act of Alabama governed the rights and liabilities of the parties because the negligent act occurred in Alabama, the court says on page 134: "It is admitted, or at least cannot be denied, that negligence of duty unproductive of damnifying results will not authorize or support a recovery. Up to the time the train passed out of Alabama no injury had resulted. For all that occurred in Alabama, therefore, no cause of action whatever arose. The fact which created the right to sue — the injury without which confessedly no action would lie anywhere — transpired in the State of Mississippi. It was in that State therefore, necessarily, that the cause of action, if any, arose; and whether a cause of action arose and existed at all or not must in all reason be determined by the law which obtained at the time and place when and where the fact which is relied on to justify a recovery transpired."

With all due respect to this learned court, its conclusion seems to give too much weight to the place of

injury, and too little weight to the place where the negligence occurred. It is true that negligence without injury gives no right of action, but it is equally true that injury without negligence gives no right of action. Hence, when the two occur in different States, it is not perceived why, in determining which state law should govern the case, more weight should be given to the place of injury than to the place of negligence. On the contrary, as the action is based upon negligence, it would seem that more weight should be given to the law of the place of negligence than to the law of the place of injury. Suppose that these facts had been reversed in the above Alabama case, and that the negligence had occurred in Mississippi and the injury in Alabama, all the other facts remaining the same, would the Alabama court have held that the action was governed by the law of Alabama, and allowed a recovery under the Alabama Employers' Liability Act, although no recovery could have been had under the law of Mississippi? Again, suppose the action were brought in a third State, different from the State of negligence and from that of the injury, would the Employers' Liability Act of the State of negligence be recognized and enforced in such third State, or would the Employers' Liability Act of the State of injury be recognized and enforced in such third State? If not, it follows that no action can be maintained under the statute in any State.

The Alabama court cites two cases in support of this view, namely, Nashville &c. Ry. *v.* Foster, 10 Lea (Tenn.), 351, and Chicago &c. Ry. *v.* Doyle, 60 Miss. 977. In the Tennessee case a brakeman in the defend-

ant's employ was killed in Alabama, and the amended declaration claimed to recover under an Alabama statute of February 5, 1872. The negligent act complained of occurred in Tennessee, and consisted in the failure of a car-inspector to discover and remedy a defective brake-nut on a railroad car. In attempting to use the brake, the wheel came off in the hands of the deceased, and he was thrown from the car and run over. It was assumed that by the law of Tennessee the plaintiff could have recovered if the injury had been received in that State, and it was found as a fact that under the Alabama law no recovery could be had, because the car-inspector and brakeman were considered fellow-servants. It was held that the case was governed by the law of Alabama, where the injury occurred, and that the plaintiff could not recover in this action in Tennessee. In this case, however, the plaintiff claimed to recover only under the Alabama statute, and the question as to which law should control was therefore not necessarily involved in the decision.

In the Mississippi case (Chicago &c. Ry. *v.* Doyle, 60 Miss. 977) a locomotive engineer in the employ of the defendant railroad was killed in Tennessee through the alleged negligent omission of duty in Mississippi of another employee of the road. The statutes of both States were substantially alike, and allowed a recovery for the negligent killing of a human being under certain circumstances. The proximate cause of the injury was the negligence of a fellow-servant of the deceased, and it was therefore held that the plaintiff could not recover under the statute of either State. The court, however, says on page 984, through Mr.

Chief Justice Campbell: "The right of the appellee is determinable by the law of Tennessee, in which State the killing of her husband occurred. . . . Physical force proceeding from this State and inflicting injury in another State might give rise to an action in either State, and *vice versa;* but the omission of some duty in Mississippi cannot transfer a consequence of it, manifested physically in another State, to Mississippi. The cases of injuries commenced in one jurisdiction and completed in another illustrate our view on this subject. The true view is that the legal entity called the corporation is omnipresent on its railroad, and the presence or absence of negligence with respect to an occurrence at any point of the line is not to be resolved by the place at which any officer or employee was stationed for duty. The question is as to duty operating effectually at the place where its alleged failure caused harm to result. The locality of the collision was in Tennessee. It was there, if anywhere, that the company was remiss in duty, for there is where its proper caution should have been used."

The court seems to have allowed a fiction concerning the omnipresence of the railroad to control and overcome the fact that the negligence occurred in Mississippi. If the proof shows that the negligence occurred in Mississippi, it seems absurd to hold that the corporation was remiss in duty in Tennessee and not in Mississippi, because the injury was received in Tennessee. The employees of railroads engaged in interstate business are peculiarly liable to injuries of this character.

Under the power to regulate interstate and foreign

commerce, it seems that Congress may provide a remedy in such case. In Lord *v.* Steamship Co., 102 U. S. 541, it was held that an act of Congress (Rev. Stat. § 4283), restricting the common-law liability of common carriers engaged in such commerce for the negligence of their servants, was valid and constitutional under the commercial clause. By parity of reasoning, it follows that an act of Congress enlarging the common-law liability of such common carriers for negligence is also constitutional.

§ 197. *Injuries received on Navigable Waters.*

The general admiralty and maritime jurisdiction of the United States extends wherever public navigation extends. This includes not only the sea, but also the great inland lakes and all other navigable waters within the United States.[1]

When an injury results in death, the rule in admiralty is the same as that of the common law, and, in the absence of an act of Congress or of a state statute, no suit in admiralty can be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or on waters navigable from the sea, caused by negligence.[2]

In Mahler *v.* Norwich &c. Co., 35 N. Y. 352, the plaintiff's intestate was killed in Long Island Sound. It was held that the Sound was within the territorial limits of the State of New York, and that an action

[1] Waring *v.* Clarke, 5 How. 441; Genessee Chief *v.* Fitzhugh, 12 How. 443; Butler *v.* Boston Steamship Co., 130 U. S. 527, 557; *In re* Garnett, 141 U. S. 1.

[2] The Harrisburg, 119 U. S. 199.

could be maintained under the New York statute. A state statute applying to death by wrongful act on navigable waters within the territorial limits of the State does not encroach upon the commercial power of Congress, and is not void as an interference with interstate commerce merely because the defendant's boat, upon which the wrongful act was committed, was engaged in interstate commerce at the time of the accident.[1]

A vessel on the high seas is for this purpose considered a part of the territory of the State in which she is registered and from which she hails. As she is not within the jurisdiction of any foreign nation, and as the matter of a right of action for personal injury has not been vested in and exercised by the United States, she is regarded as within the jurisdiction of the State, and the right of action is governed by the laws of that State. It was accordingly held in McDonald *v.* Mallory, 77 N. Y. 546, that, under the New York statutes giving a right of action for causing the death of a human being by wrongful act or neglect, an action could be maintained for the death of a citizen of New York on the high seas on board a vessel whose home port was in that State.[2] The contrary was decided by Judge Sawyer in Armstrong *v.* Beadle, 5 Sawyer, 484.

A personal injury received on navigable waters is, however, subject to the terms of the Shipowners' Lim-

[1] Sherlock *v.* Alling, 93 U. S. 99.

[2] That a ship at sea is considered part of the territory of the State or nation to which she belongs, see Crapo *v.* Kelly, 16 Wall. 610; The E. B. Ward, 17 Fed. Rep. 456; *In re* Moncan, 14 Fed. Rep. 44.

ited Liability Act of 1851 (Rev. Stat. §§ 4282–4285). This Act of Congress applies not only to injuries received on the high seas, but also to personal injuries received within the technical limits of a county in a State, even when the right of action is given by a statute of that State.[1] The States cannot change or neutralize the operation of the maritime law in maritime cases. This act of 1851 provides in substance that when the injury occurs without the neglect, privity, or knowledge of the shipowner, his liability shall in no case exceed the value of his interest in the vessel and her freight then pending. Insurance money is no part of his interest in the vessel or freight within the meaning of this statute, and therefore the shipowner may hold this money free from the claims of persons who have suffered injury or loss on navigable waters.[2]

The Act of Congress of June 26, 1884, 23 Statutes at Large, 57, reduces the individual liability of a shipowner for all debts and liabilities of the ship to the proportion of his individual share in the vessel. Section 4 of the act of June 19, 1886, 24 Stat. 79, provides that the Shipowners' Limited Liability "shall apply to all sea-going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal-boats, barges, and lighters." This section has been held to be constitutional as applied to an enrolled and licensed steamboat exclusively engaged in commerce on a navigable river above tide-water.[3]

[1] Butler *v.* Boston Steamship Co., 130 U. S. 527.

[2] The City of Norwich, 118 U. S. 468 ; Butler *v.* Boston Steamship Co., 130 U. S. 527.

[3] *In re* Garnett, 141 U. S. 1.

§ 198. *Limit of Damages Recoverable and Distribution thereof.*

There is a difference of opinion upon the first question.

Northern Pacific Ry. *v.* Babcock, 154 U. S. 190, was an action brought by an administrator to recover damages for the death of a locomotive engineer while in the employ of the railroad company, in an accident caused by a defective snow-plough. The injury was received in Montana Territory, and the action was brought in the United States Circuit Court for the District of Minnesota. The Montana statute provided that "such damages may be given as under all the circumstances of the case may be just," and the Minnesota statute in force when the injury occurred limited the amount recoverable in case of death to $5,000, though before the trial it was increased to $10,000. The plaintiff obtained a verdict for $10,000 under a ruling that the case was governed by the law of Montana. The Supreme Court held that this ruling was right, and affirmed the judgment.

In New York, however, it has been held that the extent of damages recoverable is governed by the *lex fori*, at least in the case of a New York corporation defendant, for the reason that the restriction indicates the public policy of the State, and a plaintiff who chooses to avail himself of their remedial procedure must submit to their remedial limitations, and be content with a judgment for an amount within the power of the New York courts to grant. It was accordingly decided that the plaintiff's recovery could not exceed

$5,000, the amount allowed by the New York statute, although by the statute of Pennsylvania, where the injury occurred, no restriction was placed upon the amount of damages.[1]

Upon the second question the rule seems to be that the damages recovered under a statute of another State for personal injuries should be distributed according to the laws of such other State, even if the laws of the State in which the question arises provide for their distribution to other persons.[2]

§ 199. *Procedure governed by Lex Fori.*

In an action for a personal injury received in a State other than that of suit, all matters of procedure are governed by the law of the forum. The burden of proof is a matter of procedure within this rule, and therefore the practice of such other State has no application. In the Alabama case of Helton *v.* Alabama &c. Ry., 97 Ala. 275, the injury was received in Georgia, in which State proof that the plaintiff has been injured by the defendant is proof of defendant's negligence, unless the defendant overcomes it with counter proof. In Alabama the rule is the contrary, and in the case cited it was accordingly held that the Alabama rule applied and governed the case.

The question whether vindictive or exemplary damages are recoverable is also a question of procedure. Hence, when a personal injury was received in Connect-

[1] Wooden *v.* Western New York &c. Ry., 126 N. Y. 10.

[2] McDonald *v.* McDonald, 28 S. W. Rep. (Ky.) 482; Dennick *v.* Railroad Co., 103 U. S. 11.

icut, where such damages are recoverable,[1] and suit was brought in Massachusetts, where they are not recoverable, it was held that the plaintiff could not recover such damages in Massachusetts, because the *lex fori* controlled.[2] In the same Massachusetts case it appeared that the practice in Connecticut was to have the damages assessed by the judge alone, and the plaintiff had no right to have them assessed by a jury when the defendant submitted to a default.[3] In Massachusetts the plaintiff had the right to demand an assessment of damages by a jury in such case, and it was held that the Massachusetts practice governed.

So, also, all questions relating to amendments and pleading are matters of procedure within the meaning of this rule, and the practice of the State of process controls the practice of the State of injury.[4]

In Massachusetts it has been held that, where an injury resulting in death occurs in one State and suit is brought in another State, the question as to the person entitled to sue therefor is governed by the *lex fori*. "A succession in the right of action, not existing by the common law, cannot be prescribed by the laws of one State to the tribunals of another. It is upon this principle that the negotiability of contracts, and whether an assignee can maintain an action in his own name, is held to be determined by the *lex fori*, and not by the

[1] Noyes *v.* Ward, 19 Conn. 250; Murphy *v.* New York &c. Ry., 29 Conn. 496, 499.

[2] Higgins *v.* Central New England Ry., 155 Mass. 176, 181.

[3] Gen. Stats. of Conn. of 1888, § 1106; Raymond *v.* Danbury &c. Ry., 43 Conn. 596, 598.

[4] South Carolina Ry. *v.* Nix, 68 Ga. 572.

lex loci contractus, — a matter, not of right, but of remedy." [1]

In Pennsylvania and New York and Georgia, however, the contrary has been decided.[2]

In Usher *v.* West Jersey Ry., 126 Pa. 206, a widow brought an action in Pennsylvania for the negligent killing of her husband in New Jersey. The New Jersey statute gave the right of action to the personal representative for the exclusive benefit of the widow and next of kin. A like statute of Pennsylvania gave the right of action to the widow, etc. It was held that the question as to who was entitled to sue was not a mere matter of remedy or procedure governed by the *lex fori*, but that the remedy was so inseparably attached to the right that the remedy must also be governed by the statute of the State giving this right, and in which the injury was inflicted. It was accordingly decided that the plaintiff could not recover as the widow of the deceased.

In Wooden *v.* Western New York &c. Ry., 126 N. Y. 10, the plaintiff's husband was killed in Pennsylvania through the defendant's negligence. The Pennsylvania statute giving the right of action required suit to be brought by the widow, while the like statute of New York required the action to be brought by the executor or administrator of the deceased. It was held that the *lex loci* controlled, and that the action was properly brought by the widow as such, and not as adminis-

[1] Per Hoar, J., for the court, in Richardson *v.* New York Central Ry., 98 Mass. 85, 92.

[2] Usher *v.* West Jersey Ry., 126 Pa. St. 206; Wooden *v.* Western New York &c. Ry., 126 N. Y. 10; Selma &c. Ry. *v.* Lacy, 49 Ga. 106.

tratrix. Mr. Justice Finch, in delivering the court's opinion, says on page 16: "But it must not be forgotten that the cause of action sued upon is the cause of action given by the *lex loci*, and vindicated here and in our tribunals upon principles of comity. That cause of action is given to the widow in her own right and as trustee for the children, and we open our courts to enforce it in favor of the party who has it, and not to establish a cause of action under our statute which never in fact arose. . . . It is the cause of action created and arising in Pennsylvania which our tribunals vindicate upon principles of comity, and therefore must be prosecuted here in the name of the party to whom alone belongs the right of action."

In a Kansas case it has been held that an administrator appointed in Missouri could not maintain an action in Kansas for the negligent killing of the deceased in Kansas, because the Missouri statute giving a right of action in such case provided that the action should be brought by the husband or wife of the deceased, although the Kansas statute declared that the action should be brought in the name of the personal representative for the benefit of the widow and children. The decision was placed on the ground that, as the administrator derived all his powers from the appointing State, he could not do an act in Kansas which he had not the power to perform in Missouri.[1]

[1] Limekiller *v.* Hannibal &c. Ry., 33 Kans. 83.

CHAPTER XVI.

EVIDENCE.

Section
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§ 200. *Fellow-Servant's Reputation for Incompetency.*

Evidence of a general reputation for incompetency of a fellow-servant whose negligence causes the plaintiff's injury is admissible in an action against the common employer.[1] But his reputation among a few workmen is not competent.[2]

[1] Monahan *v.* Worcester, 150 Mass. 439; Gilman *v.* Eastern Ry., 13 Allen, 433, 444.

[2] Driscoll *v.* Fall River, 163 Mass. 105.

In Driscoll *v.* Fall River, 163 Mass. 105, 107, Mr. Justice Morton for the court says: —

"A general reputation regarding the incompetency of a servant is admissible on the ground that it furnishes some reason to believe that, if the master had exercised due care, he might have learned or heard of the incompetency. But the reputation of a foreman amongst a few workmen employed under him is not a general reputation. It is merely the opinion of a small number of men, of which there is no sufficient reason to suppose the master may be cognizant, or which he may be bound to heed."

When the action is for the negligent act of a competent superintendent under the statute, evidence of the general reputation of the superintendent as a careful workman is inadmissible.[1]

§ 201. *Employer's Subsequent Acts.*

At common law, the rule is well settled in most States, though the contrary rule prevails in Pennsylvania and Kansas, that in an action for the employer's negligence, his subsequent acts in taking additional precautions to prevent similar injuries from occurring in the future are not admissible in evidence against him. Such acts do not amount to an admission of negligence on his part.[2]

[1] Malcolm *v.* Fuller, 152 Mass. 160.

[2] Columbia Railroad Co. *v.* Hawthorne, 144 U. S. 202; Menard *v.* Boston & Maine Ry., 150 Mass. 386; Downey *v.* Sawyer, 157 Mass. 418; Corcoran *v.* Peekskill, 108 N. Y. 151; Nalley *v.* Hartford Carpet Co., 51 Conn. 524; Terre Haute &c. Ry. *v.* Clem, 123 Ind. 15; Hodges *v.* Percival, 132 Ill. 53; Ely *v.* St. Louis &c. Ry., 77 Mo. 34; Hudson *v.* Chicago &c. Ry., 59 Iowa, 581; Morse *v.* Minneapolis &c. Ry., 30 Minn. 465; Hart *v.* Lancashire &c. Ry., 21 L. T. (N. S.) 261. *Contra*, McKee *v.* Bidwell, 74 Pa. St. 218; St. Louis &c. Ry. *v.* Weaver, 35 Kans. 412.

The same rule has been applied to an action under the Massachusetts Employers' Liability Act for the death of an employee, although the third section provides that the amount of compensation in case of death is to be assessed "with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable." In delivering the court's opinion Mr. Justice Lathrop says: —

"But, if evidence is not admissible to show culpability, we fail to see how it can be admissible to show the degree of culpability." [1]

§ 202. *Previous Specific Acts of Negligence.*

In an action for negligence causing personal injury, evidence is not admissible that the same person had previously committed certain negligent acts, or that he had performed certain careful acts. "If such evidence were to be received, it might be necessary to investigate the conduct of the actor in every act of his life, and to draw inferences from acts similar and dissimilar, showing every degree of care or negligence. . . . To do this would introduce a multiplicity of issues of which the parties ordinarily could not have previous notice, and which it would be impracticable properly to try." [2]

For the same reasons it is held in Massachusetts and in other States, though there are some decisions to the contrary, that a person's reputation or character for care or negligence cannot be shown by evidence of particular acts.[3]

[1] Shinners *v.* Proprietors, 154 Mass. 168, 171.

[2] Connors *v.* Morton, 160 Mass. 333, 334, 335, per Knowlton, J.; Maguire *v.* Middlesex Ry., 115 Mass. 239.

[3] Hatt *v.* Nay, 144 Mass. 186; Frazier *v.* Pennsylvania Ry., 38 Pa. St.

§ 203. *Evidence of Customary Negligence.*

In an action by a brakeman against a railroad company under the Massachusetts statute, evidence that it is customary for brakemen to jump from moving freight trains without looking to see where they would alight, and that this was done with the knowledge and approval of the defendant's superintendent, is not admissible.[1] But evidence that it is customary to inspect freight trains in motion is admissible, for the purpose of showing that a car-inspector, who is injured while inspecting a moving freight train, is in the exercise of due care and diligence.[2]

In an action under the Massachusetts act it was held that evidence that the plaintiff had boasted of his ability to keep out of the way of railroad trains was admissible against him in a suit against the railroad company for personal injuries occasioned by being run over by a train, as bearing upon the question of his carefulness or readiness to take risks.[3]

§ 204. *Evidence of Superintendence.*

Evidence of a habit or custom not to inspect railroad cars on their arrival at a certain place is competent to show that an injury caused by a brake-wheel and nut coming off while the brakeman was performing his

104. *Contra*, Baulic *v.* New York &c. Ry., 59 N. Y. 356; Pittsburgh &c. Ry. *v.* Ruby, 38 Ind. 294.

[1] Thompson *v.* Boston & Maine Ry., 153 Mass. 391. A like rule prevails in Alabama at common law. Warden *v.* Louisville &c. Ry., 94 Ala. 277.

[2] Steffe *v.* Old Colony Ry., 156 Mass. 262.

[3] Brouillette *v.* Connecticut River Ry., 162 Mass. 198.

duty was due to improper superintendence, for which the employer would be liable.[1] But a mere failure to inspect on a single occasion would be evidence only of the negligence of a fellow-servant, for which the employer would not be liable at common law.[2]

In an action under the Alabama act for a defect in the brake of a railroad car, it was held that the burden was on the plaintiff, a brakeman, to prove that the defect existed when the train was made up, or at a station where it could have been inspected, and that the defect was either known to the car-inspector there, or might have been discovered by him by the exercise of due diligence, and that such defect was the proximate cause of the injury.[3]

§ 205. *Burden of proving Defendant's Negligence.*

At common law the burden of proving that the defendant's negligence caused the plaintiff's injury is upon the plaintiff.[4]

A like rule prevails under the Employers' Liability Act.[5] Where the injury was caused by the slipping of a flight of movable stairs belonging to a third person, it was held that proof of mere knowledge on the defendant's part that the stairs were movable, without any evidence to show that movable stairs were unsafe in themselves or unsuitable for the place, or that the defendants knew or had reason to suppose that the

[1] Coffee *v.* New York &c. Ry., 155 Mass. 21.

[2] Mackin *v.* Boston & Albany Ry., 135 Mass. 201.

[3] Louisville &c. Ry. *v.* Binion, 98 Ala. 570.

[4] Louisville &c. Ry. *v.* Allen, 78 Ala. 494.

[5] Regan *v.* Donovan, 159 Mass. 1, 3; Louisville &c. Ry. *v.* Binion, 98 Ala. 570.

owner would leave them insecurely placed, is not sufficient to sustain this burden of proof.[1]

So, when the action is for an injury caused by a defect in the condition of the ways, etc., the burden is upon the plaintiff to show that the defect arose from, or had not been discovered or remedied owing to, the negligence of the defendant, or of some person in his employ and entrusted with the duty of seeing that the ways, etc., were in proper condition.[2]

§ 206. *Burden of proving Due Care of Employee.*

In Massachusetts and in some other States the burden is upon the plaintiff to prove that he was in the exercise of due care at the time of the injury. This rule applies to actions under the Employers' Liability Act, as well as to actions at common law. If the evidence is as consistent with carelessness as with due care, the action cannot be maintained.[3]

When the act alleged to be negligent points as clearly to the negligence of a fellow-servant as to that of the defendant himself, or of one of his servants for whose negligence he is liable under the statute, the plaintiff cannot recover.[4]

[1] Regan *v.* Donovan, 159 Mass. 1.

[2] Louisville &c. Ry. *v.* Campbell, 97 Ala. 147, 151.

[3] Shea *v.* Boston & Maine Ry., 154 Mass. 31; Browne *v.* New York &c. Ry., 158 Mass. 247; Irwin *v.* Alley, 158 Mass. 249; Murphy *v.* Deane, 101 Mass. 455; Chandler *v.* New York &c. Ry., 159 Mass. 589. In the above cases it was held that the plaintiff had failed to sustain this burden of proof and could not recover. In the following cases it was held that he had sustained the burden of proof: Maher *v.* Boston & Albany Ry., 158 Mass. 36; Thyng *v.* Fitchburg Ry., 156 Mass. 13; Maguire *v.* Fitchburg Ry., 146 Mass. 379.

[4] Thyng *v.* Fitchburg Ry., 156 Mass. 13. The rule is otherwise when

Where all the circumstances attending the injury are in evidence, the mere absence of evidence of fault on the part of the injured employee may justify the inference of due care.[1] But where there is an entire absence of evidence as to what he was doing at the time of the injury, the inference of due care does not arise, and the plaintiff fails to sustain the burden of proof.[2]

When there is no direct evidence as to how the injury occurred, or as to whether the injured employee was in the exercise of due care, and these questions can be answered only by conjecture, an action under the Massachusetts act cannot be sustained in the state courts.[3]

§ 207. *Same. Contrary Rule in Alabama and Elsewhere.*

In Alabama, however, the burden is not upon the plaintiff to prove that he was in the exercise of due care at the time of his injury. Want of due care on his part is a matter of defence, and must be alleged and proved by the defendant in actions under the Employers' Liability Act as well as at common law.[4] A like rule prevails in Colorado at common law,[5] and

the person injured is not an employee of the defendant; for in this case the defendant is liable for the negligence of any of its servants, and the rule of fellow-servants does not apply.

[1] Maher *v.* Boston & Albany Ry., 158 Mass. 36.

[2] Tyndale *v.* Old Colony Ry., 156 Mass. 503.

[3] Irwin *v.* Alley, 158 Mass. 249.

[4] Mary Lee Coal Co. *v.* Chambliss, 97 Ala. 171; Bromley *v.* Birmingham Ry., 95 Ala. 397.

[5] Moffatt *v.* Tenney, 17 Colo. 189; Kansas Pacific Ry. *v.* Twombly, 3 Colo. 125.

probably also under the Employers' Liability Act of 1893.

In the federal courts, also, the rule is contrary to the Massachusetts rule. The well-settled law of the federal courts is that "contributory negligence on the part of the plaintiff need not be negatived or disproved by him, but the burden of proving it is upon the defendant."[1] This seems to be the better rule, as such negligence is more properly a matter of defence than the want of it is a ground of action. Especially is this true when an employee is killed when no one is near him. In such case, if the Massachusetts rule was strictly enforced, a verdict for the plaintiff would be impossible. The rule has been somewhat relaxed, however, so as to allow a recovery where all the circumstances attending the injury are in evidence, and they fail to show any fault on the part of the injured person, upon the ground that an inference of due care is justified under these facts.[2] But where there is no direct evidence as to what he was doing, or as to how the injury occurred, no inference of due care is justified, and the plaintiff cannot recover in the state courts of Massachusetts.[3] In the federal courts, however, sitting even in Massachusetts, a recovery is not barred in this last case.[4]

[1] Railroad Co. *v.* Gladmon, 15 Wall. 401; Indianapolis Co. *v.* Horst, 93 U. S. 291; Northern Pacific Ry. *v.* Mares, 123 U. S. 710; Texas & Pacific Ry. *v.* Volk, 151 U. S. 73, 77.

[2] Maher *v.* Boston & Albany Ry., 158 Mass. 36.

[3] Tyndale *v.* Old Colony Ry., 156 Mass. 503; Irwin *v.* Alley, 158 Mass. 249.

[4] Griffin *v.* Overman Wheel Co., 61 Fed. Rep. 568. (The concurring opinion of Webb, J., seems to state the true rule.)

§ 208. *Burden of proving Plaintiff's Infancy.*

Where the plaintiff relies upon his infancy to avoid a settlement for personal injuries received while in the defendant's employ, the burden of proving infancy at the time of such settlement is upon him, and the testimony of his brother, that the reputation in the family was that the plaintiff was under twenty-one years of age at that time, is not admissible.[1]

§ 209. *Plaintiff's Belief that there was No Danger.*

On the issue as to whether the plaintiff was in the exercise of due care and diligence at the time of the injury, his belief that there was no danger, after an assurance to that effect from the defendant's superintendent under whom he was working, is admissible in evidence.[2]

§ 210. *Attorney's Authority to sign and serve Notice presumed.*

When notice of the time, place, and cause of the injury is signed by an attorney at law on behalf of the injured employee, the notice is admissible in evidence, without proof that it was given by the plaintiff's direction, or that the attorney was in fact authorized to sign and serve it. In the absence of any proof to the contrary, it will be presumed that the attorney had such authority. "His declaration that he had authority, or his assumption of authority, is *prima facie* sufficient."[3]

[1] Rogers *v.* De Bardeleben Coal Co., 97 Ala. 154.

[2] Malcolm *v.* Fuller, 152 Mass. 160.

[3] Steffe *v.* Old Colony Ry., 156 Mass. 262, 264. See, also, Manchester

§ 211. *Expert Testimony. Strength of Materials, etc.*

A person who has made a special study of the strength of materials, and the proper mode of building structures to sustain weight, may state his opinion as to whether a staging erected in a specified way can safely bear a particular load. So held in an action under the Massachusetts Employers' Liability Act to recover for an injury received by the fall of a staging upon which a load of wood had been placed.[1]

In an action under the Alabama act for a defect in the defendant's coal-way, it was held that an expert may testify that the general rule is to leave three feet between the wall of a coal-mine entry and the coal-car, and that a space of one foot and a half was unsafe.[2] The plaintiff had been crushed between the wall and his car while attempting to sprag the wheels on a down grade.

Men who have been "railroading" for fifteen years and are familiar with the duties of brakemen may testify as experts as to the proper position of brakemen on the cars, and as to the danger of riding on the edge of the car with the feet hanging over the side.[3]

A man who has operated trains on a railroad for eight years may state his opinion as to the effect of a car heavily loaded or empty running over an improperly set switch.[4]

Bank *v.* Fellows, 28 N. H. 302 ; Bridgton *v.* Bennett, 23 Me. 420 ; Addison *v.* Bishop, 2 Vt. 231.

[1] Prendible *v.* Connecticut River Manuf. Co., 160 Mass. 131.

[2] McNamara *v.* Logan, 100 Ala. 187.

[3] Schlaff *v.* Louisville &c. Ry., 100 Ala. 377.

[4] Louisville &c. Ry. *v.* Mothershed, 97 Ala. 261.

In an action under the Alabama statute to recover damages for an injury received while attempting to uncouple a car from a road-engine without a flat-car attached to the engine, a switchman, who has been "about the yard" for twenty years, may testify as an expert that it is more dangerous to uncouple a car from a road-engine which has no flat-car attached to it than if it had a flat-car attached to it, because the flat-car obviates the necessity of standing on the ground between the two while doing the uncoupling.[1]

A witness who testifies that he has had much experience in the use of a machine known as a "tipple," used in emptying refuse from coal-cars, and that he was well acquainted with its use, if not with its construction, may testify that the pattern of the tipple which killed the plaintiff's intestate was "reasonably adapted for the purpose for which it was used;" and, if he knew its condition at the time of the injury, he may state whether or not it was in good repair.[2]

In McGuerty *v.* Hale, 161 Mass. 51, a boy of eighteen years was injured by a machine while in the defendant's employ. The plaintiff asked a witness called as an expert the following question: "Should you consider that a boy eighteen years old, a short boy like the plaintiff here, was a proper person to put to work on such a machine as that before you?" It was held that the question was not one for an expert to answer, and that it was properly excluded.[3]

[1] Mobile &c. Ry. *v.* George, 94 Ala. 199.

[2] Alabama Coal Co. *v.* Pitts, 98 Ala. 285.

[3] For other illustrations of expert testimony in actions for personal injuries to employees, see Connelly *v.* Hamilton Woollen Co., 163 Mass. 156; Lang *v.* Terry, 163 Mass. 138; Twomey *v.* Swift, 163 Mass. 273; Ouillette *v.* Overman Wheel Co., 162 Mass. 305.

§ 212. *Rule of Railroad Company as Evidence.*

Upon the question of contributory negligence of an employee of a railroad in coupling cars by hand, a rule of the company, requiring coupling to be done by sticks and not by hand, is admissible in an action under the Alabama Employers' Liability Act.[1]

In an action under the Alabama statute for the negligence of a hostler in starting up a locomotive switch-engine while the plaintiff was cleaning it, if the defendant railroad relies upon a verbal rule forbidding hostlers to move switch-engines, evidence for the plaintiff that hostlers were nevertheless in the habit of moving such engines is competent to show that the railroad company acquiesced in a breach of its rule.[2]

§ 213. *Photograph of Place of Injury as Evidence.*

A photograph of the place of the injury, verified by proof that it is a true representation of the locality, is competent in evidence.[3] Under the Massachusetts practice, the question as to whether the photograph is sufficiently verified is a preliminary question of fact, to be decided by the judge presiding at the trial, and is not open to exception.[4]

[1] Memphis &c. Ry. *v.* Askew, 90 Ala. 5; Richmond &c. Ry. *v.* Hissong, 97 Ala. 187.

[2] Louisville &c. Ry. *v.* Richardson, 100 Ala. 232; Hissong *v.* Richmond &c. Ry., 91 Ala. 514. But see Richmond &c. Ry. *v.* Hissong, 97 Ala. 187.

[3] Blair *v.* Pelham, 118 Mass. 420; Kansas City &c. Ry. *v.* Smith, 90 Ala. 25; Udderzook *v.* Commonwealth, 76 Pa. St. 340; Ruloff *v.* People, 45 N. Y. 213; Church *v.* Milwaukee, 31 Wis. 512.

[4] Blair *v.* Pelham, 118 Mass. 420, 421.

§ 214. *Res Gestæ.*

In an action under the Alabama Employers' Liability Act by the administrator of a deceased employee, it was held that a declaration made by the deceased, within five minutes after receiving the fatal injuries, that he supposed it was the carelessness of the foreman, in answer to a question as to how it happened, is not part of the *res gestæ*, nor admissible on any other principle. It was not made spontaneously, but in an answer to a question; it did not illustrate, or explain, or receive support from the transaction itself, and the time after the injury was too long.[1]

§ 215. *Same. Expressions of Existing Pain.*

In Northern Pacific Ry. *v.* Urlin, 158 U. S. 271, 275, the court says by Mr. Justice Shiras: "The declarations of a party himself, to whomsoever made, are competent evidence, when confined strictly to such complaints, expressions, and exclamations as furnish evidence of a present existing pain or malady, to prove his condition, ills, pains, and symptoms, whether arising from sickness, or from an injury by accident or violence. If made to a medical attendant they are of more weight than if made to another person."[2] This was a case of personal injuries to a passenger through the negligence of the defendant railroad.

[1] Richmond &c. Ry. *v.* Hammond, 93 Ala. 181. See, also, Alabama &c. Ry. *v.* Hawk, 72 Ala. 112; Memphis &c. Ry. *v.* Womack, 84 Ala. 149; Louisville &c. Ry. *v.* Pearson, 97 Ala. 211.

[2] See, also, Fleming *v.* Springfield, 154 Mass. 520.

§ 216. *Remoteness. Other Like Facts.*

It seems impossible to frame a general rule which will be of much assistance in determining whether other facts, like those alleged to exist by the plaintiff as the ground of his action for personal injuries, are too remote to be competent as evidence or not. A few illustrations only will be attempted.

In Shea *v.* Glendale Co., 162 Mass. 463, the plaintiff alleged that he was poisoned by inhaling dust containing white lead, which came from the rubber thread on which he worked in the defendant's mill. The plaintiff offered to show that other operatives who worked in the same room with the plaintiff, at the same time and at a few months prior and subsequent thereto, had suffered from lead-poisoning. It was held that the evidence was admissible.

For other illustrations of what evidence is admissible or inadmissible upon the ground of remoteness, in personal injury suits, see Tremblay *v.* Harnden, 162 Mass. 383.

§ 217. *Compromise Offers.*

Neither at common law[1] nor under the Employers' Liability Act[2] is the admission of a party, made by way of compromise or amicable adjustment of a claim for personal injuries against an employer, competent evidence against the party making it. In Collier *v.* Coggins, *ubi supra*, it was held to be error to allow the plaintiff to prove that the defendant had stated to the

[1] Jackson *v.* Clopton, 66 Ala. 29.

[2] Collier *v.* Coggins, 103 Ala. 000; 15 So. Rep. 578.

plaintiff that he thought the plaintiff could get seventy-five dollars in compromise of his claim.

§ 218. *Mortality Tables.*

In Alabama and some other jurisdictions it is held that the American Mortality Tables, and other standard life and annuity tables, are admissible in evidence, in actions for personal injuries to employees, upon the question of the plaintiff's probable length of life. Even when the plaintiff's occupation is more hazardous than that of the persons included in the tables, they are still admissible, but this circumstance should be considered by the jury in estimating his expectancy of life and in fixing the amount of damages.[1] "They are not conclusive upon the question of the duration of life, but are competent to be weighed with other evidence. The physical condition of the injured person at the time of and next preceding the injury, his general health, his avocation in life with respect to danger, his habits, and probably other facts, properly enter into the question of the probable duration of life."[2]

§ 219. *Judicial Notice. Statutes of Other States must be proved in State Courts.*

The court cannot take judicial notice of what mechanism is in a car-brake; nor when or how it is liable to get out of repair; nor what causes it to stick.[3]

[1] Birmingham Ry. *v.* Wilmer, 97 Ala. 165; Richmond &c. Ry. *v.* Hissong, 97 Ala. 187; Central Railroad *v.* Richards, 62 Ga. 306; Santer *v.* New York Central Ry., 66 N. Y. 50; McDonald *v.* Chicago &c. Ry., 26 Iowa, 124; Vicksburg &c. Ry. *v.* Putnam, 118 U. S. 545.

[2] Mary Lee Coal Co. *v.* Chambliss, 97 Ala. 171, 175, per Coleman, J., for the court.

[3] Louisville &c. Ry. *v.* Binion, 98 Ala. 570.

In the courts of most of the States, the statutory law of a sister State is regarded, not as matter of law of which the court will take judicial notice, but as matter of fact which must be both alleged and proved.[1] It follows from this rule that a person who sues in one State under a statute of another State, for a personal injury received in such other State, must allege and prove the law of such other State as a fact, and also the facts which give him a right of action under that law.[2] When the right of action is given by statute of the State of process, there is no presumption that the State where the injury was received has a like statute;[3] and, if not given by the law of the State of injury, no action can be maintained elsewhere.[4]

When the common law of the State of process does not give a right of action for a cause of action arising in and governed by the law of another State, the law of such other State must be proved as a fact, and will not be taken notice of by the court unless so proved at the trial. Even when the State of process has a statute conferring the right of action, the court will not

[1] Knapp *v.* Abell, 10 Allen (Mass.), 485, 488; Seymour *v.* Sturgess, 26 N. Y. 134; Rice *v.* Merrimack Co., 56 N. H. 114; Salt Lake Nat. Bk. *v.* Hendrickson, 40 N. J. L. 52; Coates *v.* Mackey, 56 Md. 416, 419; Horton *v.* Critchfield, 18 Ill. 133.

[2] McLeod *v.* Connecticut &c. Ry., 58 Vt. 727; Leonard *v.* Columbia Nav. Co., 84 N. Y. 48; Palfrey *v.* Portland &c. Ry., 4 Allen (Mass.), 55, 56; Post *v.* Toledo &c. Ry., 144 Mass. 341, 342; Walsh *v.* New York &c. Ry., 160 Mass. 571.

[3] Selma &c. Ry. *v.* Lacy, 43 Ga. 461; Whitford *v.* Panama Ry., 23 N. Y. 465; Wooden *v.* Western New York &c. Ry., 126 N. Y. 10; Allen *v.* Pittsburgh &c. Ry., 45 Md. 41.

[4] *Ante*, § 195; Debevoise *v.* New York &c. Ry., 98 N. Y. 377.

presume, without proof, that the law of the other State is the same.[1]

In Kelley *v.* Kelley, 161 Mass. 111, Mr. Justice Allen, for the court, says: "In the absence of anything to show the contrary, there is a presumption that the common law of another State is like that prevailing here; but this presumption does not extend to the statutes of another State." Page 112.[2] "These [statutes] must be proved as facts at the trial; and where a question of the law of another State is in controversy, the party upon whom the burden lies will fail unless evidence is produced to sustain his view; and statutes and decisions which were not put in evidence at the trial cannot be used for the first time at the argument of the case before us for the purpose of proving the law of such State." Page 114.[3]

§ 220. *Same. When Federal Courts will take Judicial Notice of Laws of Other States.*

The federal courts, when exercising their original jurisdiction, take judicial notice, without allegation or proof, of the public laws of all the States, as well as of the United States. This includes not only the laws of the State in which they sit, but also the laws of the other States.[4] The state courts, however, generally

[1] Whitford *v.* Panama Ry., 23 N. Y. 465.

[2] Citing Harris *v.* White, 81 N. Y. 532, 544; Wilcox Silver Plate Co. *v.* Green, 72 N. Y. 17.

[3] Citing Hunt *v.* Johnson, 44 N. Y. 27; Hull *v.* Mitcheson, 64 N. Y. 639; Hacket *v.* Potter, 135 Mass. 349, 350; Murphy *v.* Collins, 121 Mass. 6; Ufford *v.* Spaulding, 156 Mass. 65, 69.

[4] Owings *v.* Hull, 9 Peters, 607; Lamar *v.* Micou, 114 U. S. 218; Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 751.

regard the laws of other States as matter of fact, of which they will not take judicial notice, and which must be alleged and proved.[1]

When the Supreme Court of the United States is exercising appellate jurisdiction, whatever was regarded as matter of fact in the court below is regarded as matter of fact in the Supreme Court; and whatever was regarded as matter of law in the court below is regarded as matter of law in the Supreme Court. Hence, on a writ of error to a state court in which the law of another State was regarded as matter of fact, the Supreme Court of the United States will also regard it as matter of fact, and will not take judicial notice of it.[2] But if the state court has taken judicial notice of the law of another State, the United States Supreme Court will also take judicial notice of it, and is not bound by the conclusion reached by the state court.[3]

[1] *Ante*, § 219.

[2] Hanley *v.* Donoghue, 116 U. S. 1; Chicago &c. Ry. *v.* Wiggins Ferry Co., 119 U. S. 615.

[3] Renaud *v.* Abbott, 116 U. S. 277.

CHAPTER XVII.

PLEADING AND PRACTICE.

Section

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§ 221. *Omission to allege Name of Superintendent, or Other Person causing Injury.*

In Alabama it has been strongly intimated, though not expressly decided, that, in an action under the stat-

ute counting on the negligence of a person to whose orders the plaintiff was bound to conform and did conform to his injury, good pleading requires the name of such person to be alleged in the complaint, so as to give the defendant notice thereof, and to present an issuable fact whether such person was in the employ of defendant, or whether the plaintiff was bound to conform to his orders.[1] A failure to allege the name of such person can be taken advantage of by special demurrer only, if at all, and it is cured by verdict.[2]

In a complaint under the act counting on the negligence of a person entrusted with the duty of seeing that the ways, works, machinery, or plant of the defendant were in proper condition, it has been decided, however, that an omission to state the name of such person is not demurrable. "The duty itself being one which rests on the master, at least to the extent of committing it to a competent employee, he is supposed to know, and generally no doubt does know, the identity of the person to whom it is committed. There is, therefore, no hardship, and no departure from cardinal rules of pleading, in exempting the plaintiff from the averment of the name of such person in actions like this."[3]

§ 222. *Undue Particularity. Allegation that Employer knew of Defect.*

Under the Alabama Employers' Liability Act it is not necessary for the plaintiff to allege or prove that

[1] McNamara *v.* Logan, 100 Ala. 187, 194.

[2] Mobile &c. Ry. *v.* George, 94 Ala. 199, 214, 215.

[3] McNamara *v.* Logan, 100 Ala. 187, 194, per McClellan, J., for the court.

the employer had knowledge of the defect before the injury was received.[1]

In Louisville &c. Ry. *v.* Coulton, 86 Ala. 129, a brakeman was injured by a defective brake. The complaint alleged that the injury "was caused by the negligence of defendant in failing to provide good and safe brakes and appliances connected therewith, and by the defendant's negligently and carelessly omitting to keep its brakes on said train in good repair, and *knowingly* allowing the same to remain out of repair." At the trial the plaintiff failed to prove that the defendant had knowledge of the defect, and the defendant contended that as the plaintiff had stated his case with unnecessary particularity, he was obliged to prove it as alleged. But the court held that this was not matter of description within the meaning of the rule, and that the plaintiff could recover without proof of such knowledge.

§ 223. *Allegation of "Due" Notice.*

It is not necessary that the declaration should state the time when notice of the time, place, and cause of the injury was given. An allegation that the plaintiff gave "due" notice of those facts, or that he "duly" gave such notice is sufficient.[2]

§ 224. *Plea of Contributory Negligence, and Waiver thereof.*

Under the Alabama practice the defence of contributory negligence is not available under the general issue,

[1] Louisville &c. Ry. *v.* Coulton, 86 Ala. 129.

[2] Steffe *v.* Old Colony Ry., 156 Mass. 262.

or plea of not guilty, but must be specially pleaded; and whenever the introduction of such evidence under the general issue is objected to, the objection should be sustained and the evidence excluded.[1] But this is an objection which may be waived by the plaintiff, and when the record shows that both parties tried the case as if a special plea had been set up, although the record shows no other plea than the general issue, this will constitute a waiver of the objection.[2]

In Massachusetts, however, the rule is well settled that contributory negligence or want of due care on the part of the plaintiff may be shown under the general issue, without a special plea.[3]

§ 225. *General Issue admits Capacity in which Plaintiff sues or Defendant is sued.*

Under the Alabama practice, when a plaintiff sues as administrator of a deceased employee, his capacity to sue is admitted by pleading the general issue, and can only be put in issue by a plea of *ne unques administrator*. "The general issue in no case puts in issue any fact the burden of proving which primarily is not upon the plaintiff." Hence, when a plaintiff sues in his representative capacity under the Employers' Liability Act, and the defendant pleads the general issue, the plaintiff need offer no proof of his appointment, as it is admitted by the plea.[4] The general issue also admits

[1] Kansas City &c. Ry. *v.* Crocker, 95 Ala. 412 (overruling Government Street Ry. *v.* Hanlon, 53 Ala. 70).

[2] Richmond &c. Ry. *v.* Farmer, 97 Ala. 141; Louisville &c. Ry. *v.* Mothershed, 97 Ala. 261.

[3] Steele *v.* Burkhardt, 104 Mass. 59, 62.

[4] Louisville &c. Ry. *v.* Trammell, 93 Ala. 350.

the capacity in which the defendant is sued, as that it is a corporation.[1]

A like rule prevails in Massachusetts under a statute providing that —

"When it appears from the papers or pleadings in a suit at law or in equity that any party sues or is sued as executor, administrator, guardian, trustee, or assignee, or as a corporation, such fact shall be taken as admitted unless the party controverting the same files in court, within ten days from the time allowed for answer, a special demand for proof of such fact."[2]

§ 226. *Election between Statutory Counts and Joinder thereof.*

The early cases under the Massachusetts act hold that if the declaration contains two or more counts under different clauses of the statute, and there is no evidence at the trial to support one of them, the plaintiff may be compelled to elect which count he will stand upon; and if he elects to drop the count which is unsupported by evidence, he is not aggrieved by the ruling to elect.[3] But the later and better practice is, not to compel the plaintiff to elect upon which count he will proceed. The reasons for this rule are thus stated by Mr. Chief Justice Field, speaking for the court in the recent case of Beauregard *v.* Webb Granite Co., 160 Mass. 201, 202: —

"The clauses in the first section of the statute state the separate grounds on which a defendant may be

[1] Zealy *v.* Birmingham Ry., 99 Ala. 579.

[2] Mass. Pub. Sts. ch. 167, § 87.

[3] Conroy *v.* Clinton, 158 Mass. 318.

liable. The evidence in any particular case may make it uncertain on which ground the liability of the defendant depends, if there is any liability; therefore a plaintiff ought to be permitted to allege all the grounds of liability which there is any evidence to support, and these we think may properly be alleged separately in separate counts. Whether they can all be alleged conjunctively in one count, it is unnecessary now to decide. The whole liability of the defendant for the death [or injury] of an employee ought to be tried in one action, and judgment in that action ought to be a bar to any subsequent action between the same parties for the same cause of action."

It was accordingly held that two counts under different clauses of the statute are not inconsistent in the legal sense, for "they only state separate grounds of liability under the same statute for the same ultimate act. There are not two causes of action, but only one, and the two counts state the different legal reasons why under the statute the defendant may be liable in damages."

If there is no evidence to support one of the counts, the proper practice is to nonsuit the plaintiff upon that count, or to direct a verdict for the defendant upon it.

A like rule obtains in Alabama under its Employers' Liability Act.[1] In Highland Avenue &c. Ry. *v.* Dusenberry, 94 Ala. 413, in which it was held that several distinct causes of action under the act could not be joined in one and the same count, Mr. Justice Walker, for the court, says on page 418: "It is quite usual in actions for torts, where a single act or transaction is

[1] Louisville &c. Ry. *v.* Mothershed, 97 Ala. 261.

complained of as the cause of the alleged injury, to insert several counts stating that act in varying shapes, to meet different phases of the proof as it may be developed, and to charge in the successive counts different breaches of duty as separate grounds of recovery. Each count is treated as the statement of a distinct cause of action, and appropriate issues may be pleaded to them severally."[1]

§ 227. *Election between Counts at Common Law and under the Statute, and Joinder thereof.*

The same rule ought to apply to this case as to that stated in the preceding section.[2] As decided in Beauregard *v.* Webb Granite Co., 160 Mass. 201, the whole question of liability for personal injury caused by a single act should be tried in one action, and settled once for all. An employer should not be harassed by several actions for the same injury, nor should the employee be compelled to bring several actions, and to try his case piecemeal. If there is no evidence to support one of the counts, a verdict may be ordered for the defendant upon that count, or the plaintiff may be nonsuited upon it. But he should not be compelled to elect between common law and statutory counts, unless the issues are so different and complicated as to confuse the jury.

In some cases, where the plaintiff was ordered to elect between such counts at the close of the evidence, and he elected to drop a count which was unsupported by evidence, it was held that the plaintiff was not

[1] Citing Maupay *v.* Holley, 3 Ala. 103.

[2] Ryalls *v.* Mechanics' Mills, 150 Mass. 190, 196.

aggrieved by the ruling to elect, and could not obtain a new trial on that ground.[1] So, if the issues under the two counts be identical, it has been held that the plaintiff cannot except to such a ruling.[2]

§ 228. *Joinder of Separate Causes of Action in One Count.*

In an action under the Alabama Employers' Liability Act, it has been held that a count which alleges four separate and distinct causes of action, under different clauses of the act, is demurrer for improper joinder of causes of action, and that a verdict and judgment for the plaintiff in the lower court will be reversed for that reason by the Supreme Court.[3] Even when only one cause of action is relied upon at the trial, and the presiding justice instructs the jury that no recovery can be had upon the others, this does not cure the error in overruling the defendant's demurrer.[4]

§ 229. *"Reporting" Case upon Nonsuit.*

Under the Massachusetts practice it is not strictly regular for the trial judge to report the case for the determination of the full court after ordering a nonsuit;[5] but where more than a year had elapsed after the injury, which barred a new action under § 3 of the statute, the court considered the question of law raised

[1] May *v.* Whittier Machine Co., 154 Mass. 29.

[2] Murray *v.* Knight, 156 Mass. 518; Brady *v.* Ludlow Manuf. Co., 154 Mass. 468.

[3] Highland Avenue &c. Ry. *v.* Dunsenberry, 94 Ala. 413.

[4] Richmond &c. Ry. *v.* Weems, 97 Ala. 270.

[5] Pub. Sts. ch. 153, § 6; Terry *v.* Brightman, 129 Mass. 535.

upon the report on its merits, instead of dismissing the report.[1]

§ 230. *Variance between Declaration and Proof.*

In an action under the Massachusetts Employers' Liability Act the declaration alleged that the injury was sustained "because of the falling in of the roof of said tannery," and further alleged that "the condition of said tannery and the roof thereof was defective and unsafe, and that said defective and unsafe condition of said tannery and roof had not been discovered and remedied owing to the negligence of the defendants, and of the person in the service of the defendants entrusted by them with the duty of seeing that said tannery and roof were in proper condition." The proof was that the chief cause, or one of the causes, of the fall of the roof, was the failure to remove snow which had accumulated upon it. It was held that evidence of the cause of the roof's falling was competent under the declaration, and that there was no variance.[2]

In an action under the Alabama Employers' Liability Act it was held that an allegation that the plaintiff was injured by reason of the negligence of some person in the defendant's employ, who had the control and superintendence of a moving car, is supported by proof that the injury was caused by the negligence of an engineer who propelled a switching-car with too great force.[3]

Where the action is brought jointly against two rail-

[1] Shea *v.* Boston & Maine Ry., 154 Mass. 31, 33.

[2] Dolan *v.* Alley, 153 Mass. 380. See, also, Whitman *v.* Groveland, 131 Mass. 553.

[3] Louisville &c. Ry. *v.* Davis, 91 Ala. 487.

road companies, by a man who was employed by both companies at their railroad crossing, proof that at the time of the injury, caused while coupling cars, he was acting exclusively for only one of the railroads, constitutes a fatal variance under the Alabama practice, and prevents a recovery against either defendant under the Employers' Liability Act.[1]

§ 231. *Nonsuit no Bar to New Action.*

A nonsuit ordered by the trial court, even after hearing all the evidence, is not such a judgment upon the merits as will bar a new action for the same injury. The plaintiff may still bring another action in some other jurisdiction whose rules are more favorable to his recovery. Thus, the plaintiff may sometimes recover in a federal court sitting either within the State whose court ordered the nonsuit, or within other States.[2]

§ 232. *Power of Supreme Court to render such Judgment as the Trial Court should have rendered.*

Under section 7 of the Alabama Acts of 1888–89, page 797, at page 800, when a case has been tried without a jury in the lower court, the Supreme Court has the power to "render such judgment in the cause as the court below should have rendered, or reverse and remand the same for further proceedings, as to the Supreme Court shall seem right." The section further provides that "either party may, by bill of exceptions,

[1] Dean *v.* East Tennessee &c. Ry., 98 Ala. 586.

[2] Gardner *v.* Michigan Central Ry., 150 U. S. 349; Bucher *v.* Cheshire Ry., 125 U. S. 555; Manhattan Ins. Co. *v.* Broughton, 109 U. S. 121; Homer *v.* Brown, 16 How. 354.

also present on appeal, for review, the conclusions and judgments of the [trial] court upon the evidence; and the Supreme Court shall review the same without any presumption in favor of the court below on the evidence."

In an action under the Employers' Liability Act the Supreme Court, acting under the above-quoted statute, reduced the judgment of the trial court from $2,500 to $1,650.[1]

§ 233. *New Trial when Verdict is against the Evidence.*

In Massachusetts and some other States the judge who presided at a jury trial may grant a new trial when he considers the verdict is contrary to the evidence, or to the weight of evidence; but the full court cannot grant a new trial on either of those grounds.[2] In Alabama and some other States, however, the full court, in reviewing the judgment of the trial court, has the power to grant a new trial on either of these grounds.[3] In Alabama, in order to justify the full court in granting a new trial for these reasons, the preponderance of evidence against the verdict, after making all reasonable presumptions in its favor, must be so decided as to clearly convince the court that it is wrong and unjust.[4]

[1] Louisville &c. Ry. *v.* Trammell, 93 Ala. 350.

[2] Forsyth *v.* Hooper, 11 Allen, 419; Taylor *v.* Carew Manuf. Co., 140 Mass. 150, 151.

[3] Cobb *v.* Malone, 92 Ala. 630; Hall *v.* Page, 4 Ga. 428; Central Railroad *v.* Richards, 62 Ga. 306; Hicks *v.* Stone, 13 Minn. 434.

[4] Mary Lee Coal Co. *v.* Chambliss, 97 Ala. 171; Western Ry. *v.* Mutch, 97 Ala. 194.

§ 234. *Restricting New Trial to Certain Issues.*

In Massachusetts the rule is well settled that in granting a new trial the full court may, under certain circumstances, restrict the trial to specific issues and eliminate therefrom other issues which were tried and determined without error in the former trial.[1] A like rule prevails in granting new trials in actions under the Employers' Liability Act. If two counts under the act be joined in one declaration, and error be committed at the trial respecting one count but none respecting the other count, the new trial will be confined to the former and denied as to the latter count;[2] also when the declaration contains a count under the statute and another count at common law.[3]

§ 235. *Setting aside Verdict by Trial Court. Number of Times allowable.*

In Massachusetts it is held that there is no limit to the number of times that the presiding justice may set aside a verdict as against the evidence or the weight of evidence.[4] Nor does the fact that the judge had refused to direct a verdict for the defendant at the trial prevent him from subsequently setting it aside on this ground. Both of these points were decided in Clark *v.* Jenkins, 162 Mass. 397, in which a third verdict for the plaintiff, in an action under the Employers' Liability Act, was

[1] Merchants' Ins. Co. *v.* Abbott, 131 Mass. 397; Patton *v.* Springfield, 99 Mass. 627; Kent *v.* Whitney, 9 Allen, 62.

[2] Bowers *v.* Connecticut River Ry., 162 Mass. 312, 318.

[3] Bowers *v.* Connecticut River Ry., 162 Mass. 312, 318.

[4] See, also, Wolbrecht *v.* Baumgarten, 26 Ill. 291.

set aside by the trial court, and the ruling sustained by the Supreme Court.

§ 236. *Insurance against Accidents. Argument of Counsel.*

The fact that an employer is insured against accidents to his employees is not a subject for legitimate argument to the jury by the plaintiff's counsel. In Tremblay *v.* Harnden, 162 Mass. 383, the defendant having admitted that he was insured against such injuries, the plaintiff's counsel claimed the right to argue to the jury that this fact rendered the defendant less likely to be careful in respect to his machinery. It was held that the presiding justice rightly refused to permit this line of argument.

§ 237. *Allowance of Exceptions. Amendment after Time for Filing Original Bill.*

A bill of exceptions filed in court within the time allowed by law may be amended after that time has expired, with the consent of the excepting party, but not without his consent. The question of allowing such amendment, however, rests in the discretion of the presiding judge.[1] The facts in the case cited did not involve the question whether a distinct exception taken at the trial and omitted from the original draft by accident or mistake can be added by amendment after the time has expired for filing exceptions. On page 561 this question was expressly reserved for future consideration.

[1] Hector *v.* Boston Electric Light Co., 161 Mass. 558.

§ 238. *Same. Proving Truth of Exceptions.*

An excepting party has the right, if he chooses, to stand upon his exceptions as originally filed, and he cannot be forced to accept an amendment. If the presiding judge will not allow them, the excepting party may prove their truth, and thus secure a hearing before the full court.[1] As to the extent to which errors in such exceptions may be corrected on a petition to prove the truth of the exceptions filed, see Morse *v.* Woodworth, 155 Mass. 233.

§ 239. *Whether Motion to nonsuit or direct Verdict need state Particulars.*

A motion for a nonsuit at the close of the evidence, based on the ground that no negligence of the defendant had been shown, in an action by an employee against an employer, is a proper way to raise the question; and it is not necessary to state the particulars in the motion, in order to enable the defendant to avail himself of the point in a higher court.[2] In Massachusetts the usual form of motion is that upon all the evidence the plaintiff cannot recover. In Alabama, if the jury believe the evidence their verdict should be for the defendant. If this motion be refused by the presiding justice, and a verdict be returned for the plaintiff, all grounds are open to the defendant in a higher court.[3]

In England, however, under the County Court Act of 1888 (51 & 52 Vict. cap. 43, § 120), there is no right

[1] Hector *v.* Boston Electric Light Co., 161 Mass. 558, 560.

[2] Byrnes *v.* New York &c. Ry., 113 N. Y. 251.

[3] O'Neil *v.* O'Leary, 164 Mass. 387.

of appeal from a county court except upon such questions of law as were raised and submitted to the county court judge at the trial. This statute has been quite strictly construed against the right of appeal.[1] In a recent case under the Employers' Liability Act it was decided by the House of Lords that, where the defendant at the trial in the county court relied merely upon the point that the plaintiff had assumed the risk of injury as a ground for a nonsuit, the point that there was no evidence of defendant's negligence to go to the jury was not open to the defendant on appeal.[2]

§ 240. *"Due Care" should be explained to Jury.*

In an action under the Massachusetts act, where one of the defences relied upon is that the plaintiff was not in the exercise of due care at the time of the injury, the plaintiff is entitled to a ruling that due care consists in the same care which people of ordinary prudence would exercise under like circumstances; and an exception will lie to a ruling that the plaintiff must have been in the exercise of "due care," or "proper care." without explanation of those terms.[3]

§ 241. *Trial Judge's Decision that Witness is an Expert: when open to Revision.*

If the presiding judge decides that a witness offered as an expert is competent, the full court cannot revise this finding of fact, unless all the material evidence bearing upon the question is set forth in the bill of

[1] Clarkson *v.* Musgrave, 9 Q. B. D. 386.
[2] Smith *v.* Baker, [1891] A. C. 325.
[3] Brick *v.* Bosworth, 162 Mass. 334.

exceptions or other record. Where it merely appears that he was an engineer, and that he was allowed to state that in his opinion a staging constructed in a particular mode would not bear a certain weight, the full court held that the question whether he was an expert was not open.[1]

In Alabama the rule seems to be less strict in this respect.[2]

§ 242. *Reasonableness of Employer's Rules is a Question of Law for the Court.*

In an action under the Alabama Employers' Liability Act it has been held that the question, whether or not a rule adopted by an employer for governing the conduct of his employees is reasonable, is a question of law for the presiding judge to decide, and should not be submitted to the jury.[3]

[1] Prendible *v.* Connecticut River Manuf. Co., 160 Mass. 131 ; Campbell *v.* Russell, 139 Mass. 278 ; Perkins *v.* Stickney, 132 Mass. 217.

[2] Alabama Coal Co. *v.* Pitts, 98 Ala. 285 ; Mobile &c. Ry. *v.* George, 94 Ala. 199.

[3] Memphis &c. Ry. *v.* Graham, 94 Ala. 545.

APPENDIX.

I. English Employers' Liability Act of 1880.
II. Alabama Employers' Liability Act of 1885.
III. Massachusetts Employers' Liability Act of 1887.
IV. Colorado Employers' Liability Act of 1893.
V. Indiana Employers' Liability Act of 1893.

I.

ENGLISH EMPLOYERS' LIABILITY ACT OF 1880.

(43 & 44 Vict. cap. 42.)

AN ACT to extend and regulate the Liability of Employers to make Compensation for Personal Injuries suffered by Workmen in their Service. [7th September, 1880.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: —

1. Where, after the commencement of this Act, personal injury is caused to a workman Amendment of law.

(1) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer; or

(2) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or

(3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed; or

(4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or

(5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway,

the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

Exceptions to amendment of law.

2. A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases; that is to say,

(1) Under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.

(2) Under sub-section four of section one, unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned; provided that where a rule or by-law has been approved or has been accepted as a proper rule or by-law by one of Her Majesty's Principal Secretaries of State, or by the Board of Trade or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective rule or by-law.

(3) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence.

Limit of sum recoverable as compensation.

3. The amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment, and in the district in which the workman is employed at the time of the injury.

4. An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months, from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death: provided always, that in case of death the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice.

Limit of time for recovery of compensation.

5. There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under, or through a workman, in respect of any cause of action arising under this Act, any penalty or part of a penalty which may have been paid in pursuance of any other Act of Parliament to such workman, representatives, or persons in respect of the same cause of action; and where an action has been brought under this Act by any workman, or the representatives of any workman, or any persons claiming by, under, or through such workman, for compensation in respect of any cause of action arising under this Act, and payment has not previously been made of any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action, such workman, representatives, or person shall not be entitled thereafter to receive any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action.

Money payable under penalty to be deducted from compensation under Act.

6. (1) Every action for recovery of compensation under this Act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior court in like manner and upon the same conditions as an action commenced in a county court may by law be removed.

Trial of actions.

(2) Upon the trial of any such action in a county court before the judge without a jury, one or more assessors may be appointed for the purpose of ascertaining the amount of compensation.

(3) For the purpose of regulating the conditions and mode of appointment and remuneration of such assessors, and all matters of procedure relating to their duties, and also for the purpose of consolidating any actions under this Act in a county court, and otherwise preventing multiplicity of such actions, rules and regulations may be made,

varied, and repealed from time to time in the same manner as rules and regulations for regulating the practice and procedure in other actions in county courts.

"County court" shall, with respect to Scotland, mean the "Sheriff's Court," and shall, with respect to Ireland, mean the "Civil Bill Court."

40 & 41 Vict. cap. 50.

In Scotland any action under this Act may be removed to the Court of Session at the instance of either party, in the manner provided by, and subject to the conditions prescribed by, section nine of the Sheriff Courts (Scotland) Act, 1877.

In Scotland the sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries.

Mode of serving notice of injury.

7. Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

The notice may be served by delivering the same to, or at the residence or place of business of, the person on whom it is to be served.

The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business; and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and, in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered.

Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at or by sending it by post in a registered letter addressed to the office, or, if there be more than one office, any one of the offices of such body.

A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.

8. For the purposes of this Act, unless the context otherwise requires, —

The expression, "person who has superintendence entrusted to him," means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labor: Definitions.

The expression "employer" includes a body of persons corporate or unincorporate:

The expression "workman" means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies. 38 & 39 Vict. cap. 90.

9. This Act shall not come into operation until the first day of January one thousand eight hundred and eighty-one, which date is in this Act referred to as the commencement of this Act.[1] Commencement of Act.

10. This Act may be cited as the Employers' Liability Act, 1880, and shall continue in force till the thirty-first day of December one thousand eight hundred and eighty-seven, and to the end of the then next session of Parliament, and no longer, unless Parliament shall otherwise determine, and all actions commenced under this Act before that period shall be continued as if the said Act had not expired.[2] Short title.

II.

ALABAMA EMPLOYERS' LIABILITY ACT OF 1885.

(Code of 1886, §§ 2590, 2591, 2592.)

§ 2590. *Liability of Master or Employer to Servant or Employee for Injuries.*

When a personal injury is received by a servant or employee in the service or business of the master or employer, the master or

[1] This section, 9, is repealed by 57 & 58 Vict. cap. 56, Statute Law Revision Act, 1894.

[2] The Employers' Liability Act, 1880, was continued in force until December 31, 1889, by 51 & 52 Vict. cap. 58, and has been continued annually since then by the Expiring Laws Continuance Act.

The following English Colonies have also enacted Employers' Liability Acts: Ontario: 49 Vict. cap. 28; Victoria: 50 Vict. No. 894; Queensland: 50 Vict. No. 24; New Zealand: 46 Vict. No. 20; New South Wales: 46 Vict. No. 6.

employer is liable to answer in damages to such servant or employee as if he were a stranger, and not engaged in such service or employment in the cases following : —

1. When the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer.

2. When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer who has any superintendence intrusted to him whilst in the exercise of such superintendence.

3. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, to whose orders or directions the servant or employee, at the time of the injury, was bound to conform, and did conform, if such injuries resulted from his having so conformed.

4. When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer in that behalf.

5. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal, points, locomotive, engine, switch, car, or train upon a railway, or of any part of the track of a railway.

But the master or employer is not liable under this section if the servant or employee knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master or employer, unless he was aware that the master or employer, or such superior, already knew of such defect or negligence; nor is the master or employer liable under subdivision one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.

§ 2591. *Personal Representative may sue, if Injury results in Death.*

If such injury results in the death of the servant or employee, his personal representative is entitled to maintain an action therefor, and the damages recovered are not subject to the payment of debts or liabilities, but shall be distributed according to the statute of distributions.

§ 2592. *Damages Exempt.*

Damages recovered by the servant or employee, of and from the master or employer, are not subject to the payment of debts or any legal liabilities incurred by him.

III.

MASSACHUSETTS EMPLOYERS' LIABILITY ACT OF 1887, WITH AMENDMENTS TO JANUARY 1, 1896.

(Statute 1887, ch. 270.)

AN ACT to extend and regulate the liability of employers to make compensation for personal injuries suffered by employees in their service.

Be it enacted, etc., as follows: —

Section 1. Where, after the passage of this Act, personal injury is caused to an employee who is himself in the exercise of due care and diligence at the time, —

Liability of employers for personal injuries suffered by employees in their services.

(1) By reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer and entrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition; or

(2) By reason of the negligence of any person in the service of the employer, entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence, or, in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer; or[1]

[1] The second clause in this sub-section, relating to "any person acting as superintendent," was added by St. 1894, ch. 499, § 1.

(3) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine, or train upon a railroad, —

the employee, or, in case the injury results in death, the legal representatives of such employee, shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of nor in the service of the employer, nor engaged in its work. And in case such death is not instantaneous, or is preceded by conscious suffering, said legal representatives may in the action brought under this section, except as hereinafter provided, also recover damages for such death. The total damages awarded hereunder, both for said death and said injury, shall not exceed five thousand dollars, and shall be apportioned by the jury between the legal representatives and the persons, if any, entitled, under the succeeding section of this Act, to bring an action for instantaneous death. If there are no such persons, then no damages for such death shall be recovered, and the damages, so far as the same are awarded for said death, shall be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable.[1] A car in use by or in the possession of a railroad company shall be considered a part of the ways, works, or machinery of the company using or having the same in possession, within the meaning of this Act, whether such car is owned by it or by some other company or person.[2]

Liability where an employee is instantly killed, etc.

Section 2. Where an employee is instantly killed, or dies without conscious suffering, as the result of the negligence of an employer, or of the negligence of any person for whose negligence the employer is liable under the provisions of this Act, the widow of the deceased, or, in case there is no widow, the next of kin, provided that such next of kin were at the time of the death of such employee dependent upon the wages of such employee for support, may maintain an action for damages therefor, and may recover in the same manner, to the same extent, as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered.

Section 3. Except in actions brought by the personal representa-

[1] The three preceding sentences, beginning with the words, "And in case such death is not instantaneous," were added by St. 1892, ch. 260, § 1.

[2] The last sentence, beginning with the words, "A car in use by," was added by St. 1893, ch. 359, § 1.

tives under section one of this Act to recover damages for both the injury and death of an employee,[1] the amount of compensation receivable under this Act in cases of personal injury shall not exceed the sum of four thousand dollars. In case of death which follows instantaneously or without conscious suffering,[2] compensation in lieu thereof may be recovered in not less than five hundred and not more than five thousand dollars, to be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable; and no action for the recovery of compensation for injury or death under this Act shall be maintained, unless notice of the time, place, and cause of the injury is given to the employer within thirty days, and the action is commenced within one year from the occurrence of the accident causing the injury or death. The notice required by this section shall be in writing, signed by the person injured, or by some one in his behalf; but if, from physical or mental incapacity, it is impossible for the person injured to give the notice within the time provided in said section, he may give the same within ten days after such incapacity is removed; and in case of his death without having given the notice, and without having been for ten days at any time after his injury of sufficient capacity to give the notice, his executor or administrator may give such notice within thirty days after his appointment.[3] But no notice given under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or cause of the injury: *provided* it is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby.[4]

Amount of compensation receivable, etc.

[1] The preceding words of this section were added by St. 1892, ch. 260, § 2.

[2] The words, "which follows instantaneously or without conscious suffering," were added by St. 1892, ch. 260, § 2.

[3] The preceding sentence requiring the notice to be in writing, etc., was added by St. 1888, ch. 155, § 1.

[4] Massachusetts statute of 1894, ch. 389, entitled "An Act relative to Notices in Cases of Injuries to Persons or Property," provides as follows: —

Section 1. In an action to recover for bodily injury, or damage to a person in his property, hereafter sustained, no defendant shall avail himself in defence of such action of any omission to state, in the written notice now required by law, the time, place, or cause of the injury or damage, unless, within five days after the receipt of a written notice given by the

Liability of employer to employee of a contractor or sub-contractor.

Section 4. Whenever an employer enters into a contract, either written or verbal, with an independent contractor to do part of such employer's work, or whenever such contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or sub-contract shall not bar the liability of the employer for injuries to the employees of such contractor or sub-contractor, by reason of any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer, or furnished by him, and if such defect arose, or had not been discovered or remedied, through the negligence of the employer, or of some person entrusted by him with the duty of seeing that they were in proper condition.

Employer not liable if employee knew of defect which caused accident and failed to give notice thereof.

Section 5. An employee or his legal representatives shall not be entitled under this Act to any right of compensation or remedy against his employer in any case where such employee knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer, who had entrusted to him some general superintendence.

Compensation where employer has contributed to an insurance fund for benefit of employees.

Section 6. Any employer who shall have contributed to an insurance fund created and maintained for the mutual purpose of indemnifying an employee for personal injuries for which compensation may be recovered under this Act, or to any relief society formed under chapter two hundred and forty-four of the acts of the year eighteen hundred and eighty-two, as authorized by chapter one hundred and

person entitled to give the same within the time now required by law, which notice shall refer to the injury or injuries sustained and claim damages or payment therefor, the person or corporation receiving such notice, or some one in his or its behalf, shall give to the person injured, or to the person giving or serving such notice in behalf of the person injured, or to the executor or administrator of the person injured, a notification in writing that the notice given is not in compliance with the law, and requesting forthwith a further written notice which shall comply with the law. And if the person legally authorized to give such notice shall, within five days after the receipt of such notification and request for a further written notice, give a further written notice complying with the law as to the time, place, and cause of the injury or damage, such notice shall be of the same legal effect as if it had been given at the time of the original notice, and shall be considered as a part thereof.

twenty-five of the Acts of the year eighteen hundred and eighty-six, may prove, in mitigation of the damages recoverable by an employee under this act, such proportion of the pecuniary benefit which has been received by such employee from any such fund or society, on account of such contribution of said employer, as the contribution of such employer to such fund or society bears to the whole contribution thereto.

Not to apply to injuries to domestic servants, etc., by other fellow-employees.

Section 7. This Act shall not apply to injuries caused to domestic servants or farm laborers by other fellow-employees, and shall take effect on the first day of September, eighteen hundred and eighty-seven.

Approved May 14, 1887.

IV.

COLORADO EMPLOYERS' LIABILITY ACT OF 1893.

(Session Laws, 1893, ch. 77.)

AN ACT concerning damages sustained by agents, servants, or employees.

Be it enacted by the General Assembly of the State of Colorado : —

Section 1. Where, after the passage of this Act, personal injury is caused to an employee who is himself in the exercise of due care and diligence at the time, —

(1) By reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, and machinery were in proper condition; or

(2) By reason of the negligence of any person in the service of the employer entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence;

(3) By reason of the negligence of any person in the service of the employer who has the charge or control of any switch, signal, locomotive engine, or train upon a railroad, —

the employee, or, in case the injury results in death, the parties entitled by law to sue and recover for such damages, shall have the same right of compensation and remedy against the employer as if

the employee had not been an employee of or in the service of the employer, or engaged in his or its works.

Section 2. The amount of compensation recoverable under this Act, in case of a personal injury resulting solely from the negligence of a co-employee, shall not exceed the sum of five thousand dollars. No action for the recovery of compensation for injury or death under this Act shall be maintained unless written notice of the time, place, and cause of the injury is given to the employer within sixty days, and the action is commenced within two years from the occurrence of the accident causing the injury or death. But no notice given under the provisions of this section shall be deemed invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or cause of injury; provided it is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby.

Section 3. Whenever an employer enters into a contract, either written or verbal, with an independent contractor, to do part of such employer's work, or whenever such contractor enters into a contract with a sub-contractor to do all or a part of the work comprised in such contract or contracts with the employer, such contract or sub-contract shall not bar the liability of the employer for injuries to the employees of such contractor or sub-contractor by reason of any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer or furnished by him, and if such defect arose, or had not been discovered or remedied, through the negligence of the employer, or of some person entrusted by him with the duty of seeing that they were in proper condition.

Section 4. An employee, or those entitled by law to sue and recover under the provisions of this Act, shall not be entitled under this Act to any right of compensation or remedy against his employer in any case where such employee knew of the defect or negligence which caused the injury, and failed within a reasonable time to give or cause to be given information thereof to the employer, or to some person superior to himself in the service of his employer who had entrusted to him some general superintendence.

Section 5. If the injury sustained by the employee is clearly the result of the negligence, carelessness, or misconduct of a co-employee, the co-employee shall be equally liable under the provisions of this Act with the employer, and may be made a party defendant in all actions brought to recover damages for such injury. Upon the trial of such action, the court may submit to, and require the jury to find

a special verdict upon the question as to whether the employer or his vice-principal was or was not guilty of negligence proximately causing the injury complained of, or whether such injury resulted solely from the negligence of the co-employee; and in case the jury by their special verdict find that the injury was solely the result of the negligence of the employer or vice-principal, then and in that case the jury shall assess the full amount of plaintiff's damages against the employer, and the suit shall be dismissed as against the employee: but in case the jury by their special verdict find that the injury resulted solely from the negligence of the co-employee, the jury may assess damages both against the employer and employee.

V.

INDIANA EMPLOYERS' LIABILITY ACT OF 1893.

(Acts of 1893, ch. 130.)

AN ACT regulating liability of railroads and other corporations, except municipal, for personal injury to persons employed by them, fixing the rules of evidence which shall govern in such cases, and providing that the decisions or statutes of other States shall not be pleaded or proven as a defense in this State: *Provided, further*, That its provisions shall not apply to any injuries sustained before it takes effect, nor in any manner any suits or legal proceedings pending at the time it takes effect, and declaring an emergency.

Section 1. Be it enacted by the General Assembly of the State of Indiana, That every railroad or other corporation, except municipal, operating in this State, shall be liable in damages for personal injury suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases: —

First. When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools, and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such ways, works, plant, tools, or machinery in proper condition.

Second. Where such injury resulted from the negligence of any person in the service of such corporation to whose order or direction the injured employee at the time of the injury was bound to conform and did conform.

Third. Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation, or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.

Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch-yard, shop, round-house, locomotive engine, or train upon a railway, or where such injury was caused by the negligence of any person, co-employee, or fellow-servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employee, or fellow-servant, at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws.

Section 2. Neither an employee nor his legal representative shall be entitled under this Act to any right of compensation or remedy against the corporation in any case where the injury results from obedience to any order which subjects the employee to palpable danger, nor where the injury was caused by the incompetency of the co-employee and such incompetency was known to the employee injured, or such injured employee, in the exercise of reasonable care, might have discovered such incompetency, unless the employee so injured gave, or caused to be given, information thereof to the corporation, or to some superior entrusted with the general superintendence of such co-employee, and such corporation failed or refused to discharge such incompetent employee within a reasonable time, or failed or refused within a reasonable time to investigate the alleged incompetency of the co-employee or superior and discharge him if found incompetent.[1]

Section 3. The damages recoverable under this Act shall be commensurate with the injury sustained, unless death results from such injury, when in such case the action shall survive and be governed in all respects by the law now in force as to such actions: *provided* that where any such person recovers a judgment against a railroad or other corporation, and such corporation takes an appeal, and pending such appeal the injured person dies, and the judgment

[1] This section was repealed by Indiana St. 1895, ch. 64, § 1.

rendered in the court below be thereafter reversed, the right of action of such person shall survive to his legal representative.

Section 4. In case any railroad corporation which owns or operates a line extending into or through the State of Indiana and into or through another or other States, and a person in the employ of such corporation, a citizen of this State, shall be injured, as provided in this Act, in any other State where such railroad is owned or operated, and a suit for such injury shall be brought in any of the courts of this State, it shall not be competent for such corporation to plead or prove the decisions or statutes of the State where such person shall have been injured as a defense to the action brought in this State.

Section 5. All contracts made by railroads or other corporations with their employees, or rules or regulations adopted by any corporation releasing or relieving it from liability to any employee having a right of action under the provisions of this Act, are hereby declared null and void. The provisions of this Act, however, shall not apply to any injuries sustained before it takes effect, nor shall it affect in any manner any suit or legal proceedings pending at the time it takes effect.

Section 6. An emergency exists for the immediate taking effect of this Act, and the same shall be in force from and after its passage.

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